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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9125.

ARKANSAS POWER & LIGHT COMPANY, *Appellant*,

v.

FEDERAL POWER COMMISSION, ET AL., *Appellees*.

Appeal from the District Court of the United States for the District of Columbia.

JOINT APPENDIX.

Complaint for a Declaratory Judgment and Injunction

2 Filed Jan 24 1945

In the United States District Court
For the District of Columbia

ARKANSAS POWER & LIGHT COMPANY, *Plaintiff*,

v.

THE FEDERAL POWER COMMISSION AND BASIL MANLY, LELAND OLDS, CLAUDE L. DRAPER, NELSON LEE SMITH AND JOHN W. SCOTT, AS COMMISSIONERS OF THE FEDERAL POWER COMMISSION; THE DEPARTMENT OF PUBLIC UTILITIES OF THE STATE OF ARKANSAS, MARVIN HATHCOAT, A. B. HILL AND CHARLES C. WINE, AS COMMISSIONERS OF THE DEPARTMENT OF PUBLIC UTILITIES OF THE STATE OF ARKANSAS, *Defendants*.

A.

1. Plaintiff, Arkansas Power & Light Company, is a corporation organized and existing under the laws of the State of Arkansas. Its principal office and place of business and post office address are Simmons National Building, Pine Bluff, Arkansas.

2. (a) The defendant, the Federal Power Commission (sometimes hereinafter referred to as "Commission"), is an administrative agency of the United States of America, created and empowered by the Federal Power Act (16 U. S. C. A. Sec. 791a et seq.). Its address is Washington 2, D. C. The defendants Basil Manly, Leland Olds, Claude L. Draper, Nelson Lee Smith, and John W. Scott are the duly appointed, qualified and acting commissioners and members of the Federal Power Commission. Their address is c/o the Federal Power Commission, Washington 2, D. C. The individual defendants named in this paragraph as

members and commissioners of the Federal Power Commission and the Commission are charged with the duties of administering said Federal Power Act.

2. (b) The defendant, the Department of Public Utilities of the State of Arkansas (sometimes hereinafter referred to as the "Department"), is an administrative agency of the State of Arkansas, created and empowered by Act 324 of the Acts of the General Assembly of Arkansas approved April 2, 1935. The Department's address is Capitol Building, Little Rock, Arkansas. The defendants Marvin Hathcoat, A. B. Hill and Charles C. Wine are the duly appointed, qualified and acting commissioners of the Department and their address is the same as that of the Department. The individual defendants named in this paragraph as commissioners of said Department and the said Department are charged with the duties of administering said Act 324.

B.

3. This action arises under the Constitution and laws of the United States and of the State of Arkansas and
3 orders of the Commission and of the Department.

By this suit the plaintiff seeks, with other relief, a declaratory judgment under Section 274d of the Judicial Code (28 U. S. C. A. Sec. 400) for the purpose of settling and determining a patent and irreconcilable conflict between the asserted jurisdiction and powers of the Commission and the asserted jurisdiction and powers of the Department and, in this connection, hereinafter prays judgment:

(1) That the Commission is asserting, assuming and attempting to exercise power, authority, and jurisdiction not conferred upon it by the Federal Power Act whereby, as hereinafter fully set forth, the Commission is undertaking to and will:

(a) Regulate, control, supervise and direct the keeping of, and the entries made and to be made, in plaintiff's primary, dominant and principal books of accounts;

(b) Require, direct and order all amounts or items appearing upon the said books of accounts of plaintiff representing excess over original cost of its property used in public service to be written or charged off or amortized out of said books; or

(2) In the event the court should determine that the Commission has colorable power, authority and jurisdiction under said Federal Power Act to do, perform, direct or order done, any of the acts or things set forth in paragraphs 3 (1) (a) or 3 (1) (b) hereof, that the sections and paragraphs of said Act, more particularly hereinafter set forth, claimed to confer, or colorably conferring, such power, authority and jurisdiction, each violates the Commerce Clause (Section 8, clause 3) of Article I, the full faith and credit clause (Section 1) of Article IV of the Constitution of the United States, and Amendment X and the due process clause of Amendment V to such Constitution;

(3) In the event it should be determined that the Commission has the power and authority to do and perform and to direct and order the plaintiff to do and perform the matters and things set forth in paragraphs 3 (1) (a) and 3 (1) (b) hereof, that said Act 324 and the order issued by the Department on June 24, 1944, both in the particulars hereinafter set forth, violate the Commerce Clause of Article I of the Constitution of the United States and are void and of no force and effect.

4. As is hereinafter more fully set forth, the value of the rights which plaintiff seeks to protect, the value of the property and property rights and the extent of the injury involved herein exceed the sum of three thousand dollars ($3,000), exclusive of interest and costs.

C.

5. Exclusively in the State of Arkansas, the plaintiff owns and operates (a) facilities for the generation and transmission of electric energy transmitted and sold in both interstate and intrastate commerce and (b) facilities used

exclusively in the transmission and distribution of electric energy in intrastate commerce. It also owns and operates a street railway and motor bus transportation system, natural gas distribution properties, and steam heat facilities. It formerly owned and operated ice manufacturing properties and facilities for the local distribution of water.

4 All of its business and operations are transacted and carried on in the State of Arkansas. The plaintiff's business is predominantly local and intrastate and the greater portion of its property is used exclusively in such business.

6. The plaintiff is a public utility within the terms and provisions of Section 1 of Act 324 of the Acts of the General Assembly of Arkansas, approved April 2, 1935. By the terms of said Act the Department of Public Utilities of the State of Arkansas was created and empowered, and all of the power of regulation and supervision reserved by the State of Arkansas, and not granted to the United States by the Commerce Clause of the Federal Constitution, over the property and facilities of the plaintiff, its business transactions, activities, accounting, records and books of accounts were, by the terms of said Act, delegated to and conferred upon said Department. The said Department has, since its creation and organization, actively and vigorously asserted and exercised the said powers with respect to the property, business transactions and affairs of the plaintiff.

7. The Department, among other authority and powers, is specifically authorized and empowered to promulgate, and require the plaintiff to keep and maintain primary, dominant and principal books of accounts according to, a uniform system of accounts of the Department and its rules regulating accounting. The Department is authorized to regulate, and actually regulates, the issuance of securities by plaintiff and the creation of liens upon its property devoted to the public service.

8. The Department has promulgated and adopted a uniform system of accounts, a copy of which is made a part hereof to the same extent as if copied herein in full, is marked Exhibit 1 and filed herewith.

9. By order dated June 24, 1944, the Department, acting within its lawful powers, and after an extended hearing, made, in conformity with its said uniform system of accounts, a complete reclassification of plaintiff's plant account, and separately found and fixed, as of December 31, 1936, and of December 31, 1943, the original cost of plaintiff's electric, gas, steam heat, ice, water, and transportation properties, the respective acquisition costs thereof and the excess of the recorded costs of said property over their actual cost to the plaintiff, or affiliated interests, as the results of arm's-length bargaining, and directed the plaintiff to record in its primary, dominant and principal books and records, in the proper and applicable accounts thereof, such amounts as would reflect the Department's findings, and further directed the disposition of the several amounts directed to be charged to the acquisition accounts, to-wit: Account 100.5 (Electric Plant Acquisition Adjustments) and to Account 107 (Electric Plant Adjustments). The entire and complete action of the said Department will more fully appear from a copy of its findings and order dated June 24, 1944, which is made a part hereof to the same extent as if copied herein in full, is marked Exhibit 2 and filed herewith.

10. The Department also by its order (Ex. 2 hereto) ascertained and fixed a rate base on which plaintiff shall be permitted to earn a reasonable return from its electric operations. This rate base was found to be the prudent investment made by the plaintiff in electric facilities, determined by the Department after giving recognition to the several adjustments heretofore referred to. The Department also directed the plaintiff to file new schedules of rates for all its several classes of customers which would effect an annual reduction in its gross electric revenue for

the year 1943 of at least $975,000.00. The Department further promulgated and adopted a formula for the future automatic adjustment of plaintiff's electric rates.

11. The plaintiff, as permitted by the Arkansas statute, secured a judicial review of the Department's order (Ex. 2 hereto) by a court of that state having jurisdiction. The court affirmed the said order, which has become final. A copy of the judgment of said court is made a part hereof, marked Exhibit 3, and filed herewith.

12. The plaintiff has readjusted its capital structure to comply with, and in all other respects has complied with, the terms and directions of said order (Ex. 2 hereto) of the Department and has filed new schedules of rates effecting an estimated reduction in its electric revenue of more than $1,100,000.00 annually.

13. All of the entries necessary to reflect the adjustments directed and ordered to be made by the Department were made upon the primary, dominant, principal, and only, books of accounts kept and maintained by the plaintiff.

14. The plaintiff is also a public utility within the meaning of Section 201 (e) of the Federal Power Act. The purpose of that Act was primarily to regulate rates and charges for interstate energy. By that Act (Sec. 201 (b)) Congress conferred upon the Commission jurisdiction over a very small portion of plaintiff's electric facilities—only over those which transmit energy actually moving in interstate commerce and used in the sale thereof at wholesale for resale—and specifically withheld from the Commission power or jurisdiction over all of plaintiff's property used exclusively in the intrastate transmission and distribution of electric energy and the sale thereof to consumers in the State of Arkansas, and over property other than electric.

15. Under said Federal Power Act, the Commission has no jurisdiction or power to require the plaintiff to charge off or amortize out of its primary, dominant and principal books of account any items ascertained to represent excess of recorded over original cost. Nor does the Commission

have any power over, or jurisdiction to regulate, the issuance of securities by the plaintiff.

16. Notwithstanding the limitations upon the jurisdiction of the Federal Power Commission over plaintiff's property, that Commission, acting under authority supposed or assumed to have been conferred upon it by Secs. 4 (b), 301 (a), 304 (a), and 309, and par. (13) of Sec. 3 of said Federal Power Act, on June 16, 1936, issued its order numbered 42 and thereby adopted an accompanying system of accounts entitled "Uniform System of Accounts prescribed for public utilities and licensees subject to the provisions of the Federal Power Act." Copies of said orders, statements of amendments thereto, and said uniform system of accounts, as amended and as distributed by the Commission, are made a part hereof, marked Exhibit 4 hereto, and filed herewith.

17. By reason of the instructions made a part of its said uniform system of accounts and included in Exhibit 4 hereto, the Commission has, unlawfully and without authority, assumed and, as will hereinafter appear, now asserts power and authority not granted or authorized, directly or by implication, by the sections of the Federal Power Act set out in the foregoing paragraph, to regulate, dictate, and supervise the entries made and to be made in plaintiff's primary, dominant and principal books of accounts.

18. If the language of the sections, or either of them, of the Federal Power Act set out in paragraph 16 hereof is sufficient of itself to authorize the Commission to assume and exercise regulatory and supervisory power and authority over all or any of the entries made and to be made in plaintiff's primary, dominant and principal books of account, with respect to all or any of its property or
6 facilities, and all or any transactions of the plaintiff, said sections transcend and violate the Commerce Clause of Article I of the Constitution of the United States and Amendment X thereto, and are therefore void and of no force and effect.

19. A large part of the property and facilities of the plaintiff are exclusively used in the intrastate transmission and distribution of electric energy. Said property so used, as well as many transactions of the plaintiff, have no relation or bearing, directly or otherwise, upon property or facilities used in interstate commerce or transactions pertaining to said commerce.

20. If the language of the sections, or either of them of the Federal Power Act set out in paragraph 16 hereof authorizes or empowers the Commission to regulate, supervise or direct the entries made and to be made in plaintiff's primary, dominant and principal books of accounts with respect to its property and facilities used exclusively in the intrastate transmission and distribution of electric energy, or with respect to transactions on property having no relation or bearing, directly or otherwise, upon property or facilities used in interstate commerce, said sections, or either of them, thought so to authorize and empower the Commission, violate the Commerce Clause of Article I of the Constitution of the United States and Amendment X thereto.

21. (a) The Commission, proceeding under "Instructions—Electric Plant Accounts" set out in its uniform system of accounts and Sec. 208 (b) of the Federal Power Act, required the plaintiff to file a report, which has been filed, reclassifying its electric and other plant accounts pursuant to the Commission's uniform system of accounts, as well as a statement of the original cost of all its property used in supplying electric service.

(b) At the direction of the Commission, members of its staff made an examination and audit of said report and statement and filed an original report and recommendations with respect thereto. After the Department had issued its order (Ex. 2 hereto) said staff made a further examination and audit with respect to said reclassification report and statement of original cost as filed by the plaintiff, and filed a supplemental report and recommendations.

Copies of said original and supplemental reports and recommendations are made a part hereof and respectively marked Exhibits 5 and 6 hereto and are filed herewith.

(c) Said supplemental staff report, as of January 1, 1937, makes a reclassification of plaintiff's plant account covering all of its property in electric and other public service and recommends that the original cost of plaintiff's electric property be established at $35,082,500.38 and that the amount of $11,881,199.23 be established in Account 107 (Electric Plant Adjustments). The said supplemental report also sets up a new Account 108.15, not specifically authorized by the Commission's uniform system, and recommends that the amount of $9,293,057.46 be established therein. The amount recommended by said staff report to be established in Account 108.15 represents the difference between the staff's recommendations as to original cost of all of plaintiff's property and the staff's determination of actual cost thereof to plaintiff or its affiliates as the result of arm's-length bargaining.

(d) Said supplemental staff report, among other things, recommends that $9,141,473.01 of the amount by said report established in Account 107 be charged to Earned Surplus or Capital Surplus, and that the remainder of said amount be charged to other accounts. Said supplemental staff report also recommends that the plaintiff be required to submit a plan for the disposition of the $9,293,057.46 established in Account 108.15.

7 (e) All of the debits and credits and adjustments made since December 1, 1937 by the plaintiff to its plant account were by said staff report reversed upon the theory that they were prematurely made without the approval and order of the Commission, although they were approved or directed to be made by the Department.

22. On September 27, 1944, the Commission, in a cause carried upon its docket entitled "In the matter of the Arkansas Power & Light Company, Docket No. IT-5829" issued an order requiring plaintiff to respond to the recom-

mendations of said supplemental staff report, such response to include a plan for the disposition of the amounts by said supplemental staff report established in the adjustment accounts, and to report any amounts disposed of by the plaintiff since December 31, 1936 which the said staff report may have established in Accounts 107 and 108.15, together with the manner in which they were disposed of. A copy of said order is made a part hereof, marked Exhibit 7 hereto, and filed herewith.

23. In issuing said order (Ex. 7 hereto) and therein directing that a hearing be held and in requiring the plaintiff to respond to the recommendations of said supplemental staff report, and in incorporating in said order the other matters therein mentioned, the Commission is unlawfully exercising power and authority, not conferred upon it by the Congress, whereby the Commission will (1) ascertain and fix, and direct the recordation upon plaintiff's primary, dominant and principal books of accounts, of the original cost of plaintiff's property and facilities used in interstate commerce, electric transmission and distribution facilities used exclusively in intrastate commerce and gas, steam heat, water, ice, and transportation facilities; (2) direct that plaintiff in said books of accounts charge to earned or capital surplus $9,141,473.01, and require the plaintiff to amortize over a period of years by charges to its net annual earnings $9,293,057.46 established by said supplemental staff report, respectively, in Accounts 107 and 108.15.

24. If any section or paragraph of the Federal Power Act should be construed to confer or to grant power and authority to the Commission to do, or to require and order the plaintiff to do, any of the matters and things set out in paragraph 23 hereof, each and every of said sections and paragraphs would violate the Commerce Clause of Article I of the Constitution of the United States and Amendment X thereto, and each and every such section and paragraph of said Act by reason of such construction would be rendered void and of no force and effect.

25. The establishment of the original cost of plaintiff's electric property and the disposition of the amounts established by the supplemental staff report (Ex. 6 hereto) in Accounts 107 and 108.15, both as undertaken by the Commission by its order (Ex. 7 hereto) and by its order of January 2, 1945, hereinafter referred to (Ex. 9 hereto), will not aid or facilitate the discharge of any of the Commission's duties or powers conferred upon or granted it by the Federal Power Act, nor will any disposition of said amounts have any relation or bearing, directly or otherwise, upon the transmission and sale of electric energy at wholesale in interstate commerce, or the rates therefor.

26. Therefore, the Commission does not have, and the Congress is powerless under the Commerce Clause of Article I of the Federal Constitution to grant it, any power and authority to consider and determine the issues stated in or raised by the said orders (Exs. 7 and 9 hereto) insofar as such issues and the determination thereof may control or affect any entries made or to be made in plaintiff's primary, dominant and principal books of accounts.

8 27. The uniform system of accounts established by the Department and now followed and observed by the plaintiff is substantially, if not exactly, the same as the system of accounts adopted and enforced by the Commission with respect to the text of accounts, the numbers thereof, and instructions and directions as to the particular character of items to be debited and credited to said particular accounts.

28. Inasmuch as the original cost of plaintiff's electric plant, as established by the Department's order (Ex. 2 hereto), is only $254,160.33 more than such cost, as "established" by the staff of the Commission, which difference could have no appreciable effect upon rates for energy transmitted and sold in interstate commerce, the primary, dominant and principal books of accounts of the plaintiff, as required to be kept under the jurisdiction of the Department and as adjusted by the Department's order (Ex. 2

hereto), fully reflect and furnish all information essential, necessary, or convenient to the exercise of the powers and authority conferred upon the Commission.

29. (a) At least $6,947,058.92 established and retained in Account 100.5 by the Department's order (Ex. 2 hereto) is included in the amounts "established" by the staff of the Commission in Accounts 107 and 108.15. The Department in said order determined that the amount next aforesaid represented actual arm's-length cost and "value as of the date it was expended and that such value existed and was inherent in" plaintiff's "electric system on December 31, 1943, and, therefore the amount of said item should not be charged off or amortized, and should be recognized and included as a part of the valid and present existing assets and values."

(b) The balance remaining in Accounts 107 and 108.15, as "determined" by the Commission's staff, with the exception of $254,160.33, the amount by which Department's original cost of plaintiff's electric property exceeds the staff's finding as the original cost of said property, has been disposed of by the plaintiff either prior to the order of the Department, or subsequent thereto, by charges to other accounts, including charges to earned or capital surplus and charges to Account 108. The dispositions of all these amounts were either approved by, or made at the direction of, the Department.

30. In requiring the plaintiff to "set forth any amounts disposed of by it since December 31, 1936, which are recommended for classification by the staff in Accounts 107 and 108.15 together with the manner in which such disposition was made" (Ex. 7 hereto), the Commission proposes to and will exercise power to review, reverse, and set aside the findings and order of the Department (Ex. 2 hereto).

31. The Commission has no power or authority to undertake to or to do the matters and things as set forth in paragraph 30 hereof. If, however, the Federal Power Act is construed to grant such power, the section or paragraph

thereof thought, or construed, to make such a grant of power would deny to the public acts and judicial proceedings of the State of Arkansas the full faith and credit secured to said State by Section 1 of Article IV of the Constitution of the United States, and said sections or paragraphs would also violate the Commerce Clause of Article I of, and Amendment X to, said Constitution, and in either event said sections and paragraphs would be void and of no force and effect.

32. (a) Under Section 61 of the Arkansas Utility Act (Act 324 of 1935) the plaintiff is subjected to a fine of not less than $100.00 nor more than $1,000.00 for each day's failure to obey and comply with each and every direction and order of the Department.

9 (b) Section 315 (a) and Section 316 of the Federal Power Act subjects the plaintiff and its officers, agents and employees to severe and onerous criminal penalties for failure to comply with any order, rule, regulation, restriction or condition of the Commission.

33. (a) The orders issued by the Commission (Exs. 7 and 9 hereto), among other things, require the plaintiff to submit a plan for eliminating from its books of accounts the amounts assigned by the supplemental staff report (Ex. 6 hereto) to Accounts 107 and 108.15. In submitting a plan for the disposition of said amounts different from the disposition already made thereof, with the approval and at the direction of the Department, the plaintiff would be proposing to violate the Arkansas statute and if such plan were carried into effect the plaintiff would incur the penalties provided in said statute. Especially would this be true, since many of the items established in said accounts by said supplemental staff report have no relation whatever to the acquisition of facilities used in, or transactions pertaining to, interstate commerce or to plaintiff's electric plant and, further, since all of said items have been definitely considered, determined, classified and disposed of by the Department and plaintiff's primary, dominant and prin-

cipal books of accounts have been adjusted to reflect the Department's findings and order upon which the Department has fixed plaintiff's electric rate base.

(b) On the other hand, should the plaintiff not comply with the directions and orders of the Commission, and such orders as may hereafter be made by it, the plaintiff will incur the penalties of the Federal Power Act. Because of the circumstances heretofore set forth, the plaintiff's position is at once uncertain and perilous.

34. The Department has threatened to and will prosecute the plaintiff, under the laws of the State of Arkansas, (1) for any failure to observe and comply with the orders and directions of the Department with respect to the disposition of any items found by the Department to represent excess over original cost of plaintiff's electric and other property, and (2) if the plaintiff at the instance of the Commission, should make any change, adjustment, or alteration in any account as ascertained, determined or directed to be stated by the Department in its said order (Ex. 2 hereto).

35. The threatened action of the Department and that proposed by the Commission raise a sharp conflict of jurisdiction between the agencies of the State of Arkansas and the United States and the plaintiff is entitled to have this conflict clarified and determined before proceeding further in the cause now pending before the Commission.

36. (a) Inasmuch as the plaintiff is an Arkansas Corporation operating exclusively in that state and owning no utility property beyond the confines thereof (except for an unimportant distribution extension from Junction City, Arkansas, into Louisiana), it is required by the laws of said state to maintain and keep under the jurisdiction and supervision of the Department primary, dominant, and principal books of accounts in such form and manner as the Department may direct and as provided by said Department's uniform system of accounts. From the entries recorded and set forth in said primary, dominant and principal books of accounts the plaintiff must, from time to time, compile

and circulate, for the information of its bondholders, preferred and common stockholders, and the public, annual statements, and the said entries recorded in said books provide the basic data for the payment of bond interest and the declaration of dividends under the laws of the State of Arkansas.

(b) For the purposes aforesaid, the plaintiff cannot have two sets of books of accounts containing different, conflicting entries.

(c) Inasmuch as the Department has jurisdiction of plaintiff's security issues to the exclusion of the Commission, and since the books of the plaintiff kept in compliance with the Department's rules regulating accounting and its uniform system of accounts fulfill every convenience, requirement and necessity of the Commission in the discharge of its duties under the Federal Power Act, the plaintiff alleges that the jurisdiction over its primary, dominant and principal books of accounts is exclusively vested in the Department and that the Commission has no power and authority over such books of accounts and that Congress has not conferred and cannot constitutionally confer such power and authority.

37. Any disposition ordered and directed by the Commission of the $6,947,058.92, assigned by the Department to Account 100.5, or of any of the other items assigned by said supplemental staff report to Accounts 107 and 108.15 contrary to the disposition thereof ordered and directed by the Department would deprive the plaintiff of its property without due process of law in violation of the due process clause of the Fifth Amendment to the Constitution of the United States and would be a failure to give full faith and credit to the public acts and judicial proceedings of the State of Arkansas and its governmental agencies in violation of the full faith and credit clause of Section 1 of Article IV of said Constitution.

38. Any changes or further adjustments made in plaintiff's primary, dominant and principal books of accounts at

the instance of the Commission, as proposed or put in issue by its orders (Exs. 7 and 9 hereto), will result in a change, adjustment, or alteration of plaintiff's electric rate base as established and fixed by said order of the Department (Ex. 2 hereto), and will deprive the plaintiff of its property without due process of law and will take its property for public use without just compensation in violation of Amendment V to the Constitution of the United States.

39. The plaintiff filed with the Commission a petition setting forth substantially the facts herein alleged, calling attention of the Commission to the dilemma confronting the plaintiff and asked the Commission (1) to cancel and set aside its order of September 27, 1944 (Ex. 7 hereto); or (2) that said order and the recommendations of the supplemental report of the Commission's staff be amended by narrowing the issues raised thereby to amounts and transactions arising out of plaintiff's acquisition of facilities actually used and useful in interstate commerce and by eliminating those issues with respect to items solely involving ice, water, gas, steam heat, transportation and local electric distribution and intrastate transmission properties. A copy of said petition is made a part hereof, marked Exhibit 8, and filed herewith.

40. The Commission failed to act upon said petition as requested by plaintiff and has by order of January 2, 1945 (Ex. 9 hereto) set the issues raised in its order of September 27, 1944 (Ex. 7 hereto) for hearing to be held at the Commission's Hearing Room, 1800 Pennsylvania Avenue N. W., Washington, D. C., on the 20th day of February, 1945. Copy of said order of the Commission, dated January 2, 1945, is made a part hereof, marked Exhibit 9, and filed herewith. The Commission by said orders has assumed the jurisdiction and power to consider, determine, and decide all of the issues raised both by said order (Ex. 9 hereto) and by its order of September 27, 1944 (Ex. 7 hereto) and said supplemental staff report (Ex. 6 hereto) and will, unless restrained by this court, proceed to consider

and determine said issues and will direct and order
11 the plaintiff not only to dispose of the items established by said supplemental staff report (Ex. 6 hereto) in Accounts 107 and 108.15, but will ascertain and fix the original cost of plaintiff's electric facilities, and of all its other properties, and will order and direct the plaintiff to record such amounts so fixed and their disposition in its primary, dominant and principal books of accounts, in the doing of any of which the Commission will exceed any power or authority conferred upon it by Congress or any power or authority possessed by Congress. In this connection, plaintiff believes and therefore alleges that such a hearing will continue over a period of several weeks, will require the attendance in Washington of its principal executives and a number of its employees at a time when their services are urgently necessary in the operations of plaintiff's property during a period of national emergency and will require the expenditure by the plaintiff of approximately $100,000.00.

41. In the event it should be determined that the sole, exclusive, and primary jurisdiction to supervise and regulate the entries made in plaintiff's primary, dominant and principal books of accounts lies with the Commission and not with the Department, the plaintiff alleges that the action of the Department in determining the original cost of plaintiff's property, the excess of the recorded cost thereof over its original cost, and the disposition of said excess, as made by said Department in its said order (Ex. 2 hereto), and the direction that said disposition should be entered on plaintiff's primary, dominant and principal books of accounts, is void and of no force and effect, was an assertion and exercise of power by the Department in violation of the Commerce Clause of Article I of the Constitution of the United States and that all of the Department's said actions are therefore void and of no force and effect.

42. The plaintiff verily fears and believes, and so believing avers (1) that the Commission will proceed with its hearing and will issue an order substantially in accord with the recommendations of said supplemental staff report, by which plaintiff will be required to reverse and readjust the entries made in its primary, dominant and principal books of accounts as approved or directed to be made by the Department; (2) that if plaintiff attempts to comply with the order and direction of the Commission, the Department will proceed against the plaintiff as provided by the criminal statutes of the State of Arkansas and subject the plaintiff to the penalties therein provided, and (3) that, if plaintiff fails to comply with such order and direction of the Commission, the plaintiff will be subject to the penalties and forfeitures provided by the Federal Power Act.

43. The plaintiff therefore alleges that, under all the facts and circumstances hereinbefore set forth, it is entitled (a) to an order restraining the Commission and the members thereof from further proceeding with the Commission's proposed hearing in the cause pending upon its docket entitled, "In the matter of Arkansas Power & Light Company, Docket IT-5829," (b) to an interlocutory injunction to the same effect, and (c), upon final hearing, to a permanent injunction issued against the Commission and its members to the same effect as said restraining order, or, if the Commission is held to have jurisdiction over the plaintiff's primary, dominant and principal books of accounts to the exclusion of the Department and over the entries to be made therein, and that the Commission has exclusive jurisdiction to hear and determine each and every of the issues raised by said supplemental staff report (Ex. 6 hereto) and the Commission's orders of September 27, 1944, and January 2, 1945, (Exs. 7 and 9 hereto), that the Department and its members should be permanently enjoined from prosecuting the plaintiff under the laws of the
12 State of Arkansas for any failure to obey Act 324 of the General Assembly of Arkansas, approved

April 2, 1935, and the orders, rules and regulations of the Department.

Wherefore, Plaintiff Prays:

(1) That this court issue forthwith its temporary restraining order against the Commission and the defendant members thereof, their agents, assistants, deputies, and employees, and all persons acting or assuming to act under their direction, enjoining and restraining them, until the further orders of the court from proceeding further or taking any further action in a cause pending upon the docket of said Commission entitled, "In the matter of Arkansas Power & Light Company, Docket IT-5829";

(2) That a special court of three judges be constituted to hear and determine this cause pursuant to Sections 380 and 380a of Title 28 U. S. C. A.;

(3) That such restraining order be continued in force as an interlocutory injunction until final hearing and determination of this cause;

(4) That upon final hearing of this cause, the interlocutory injunction against the Commission and the defendant members thereof be made permanent;

(5) That upon final hearing, this court adjudge, decree and declare the rights and legal relations of the parties to the subject matter here in controversy as follows:

(a) That the exclusive jurisdiction of plaintiff's primary, dominant and principal books of accounts and of the entries made and to be made and of the amounts entered and to be entered therein is vested in the Department;

(b) That the Commission and its members have no power or jurisdiction to ascertain or fix the original or acquisition cost of any of plaintiff's electric facilities used exclusively in the intrastate transmission and distribution of electric energy and of its natural gas distribution, steam heat and transportation properties, or of its formerly owned ice manufacturing and water distribution properties;

(c) That the Commission and its members have no power or jurisdiction, by order or otherwise, to direct the plaintiff

to dispose of, charge off, or amortize out of its primary, dominant and principal books of accounts any items or amounts recorded therein representing the excess of recorded cost of property over the original cost thereof;

(d) That the Commission and its members have no power or jurisdiction, by order or otherwise, to direct the plaintiff to dispose of, charge off, or amortize out of its primary, dominant and principal books of accounts any items or amounts recorded therein representing the excess of recorded cost over the original cost of plaintiff's property not used in the transmission of electric energy in interstate commerce or in the sale of such energy in interstate commerce;

(e) That, if any section or paragraph of the Federal Power Act, and especially Sections 4 (b), 201 (a), 201 (b), 201 (c), 201 (d), 201 (e), 203 (a), 205 (a), 206 (a), 206 (b), 207, 208 (a), 208 (b), 301 (a), 302 (a), 304 (a), 309, 311, and Paragraph (13) of Section 3 of said Act, or either of them, is construed to give or grant to the Commission, or its members, power or jurisdiction (1) to regulate,
13 control, direct, and supervise plaintiff's primary, dominant and principal books of accounts; (2) to ascertain and fix the original cost of plaintiff's property mentioned in paragraph 5 (b) of this prayer; (3) to direct and order the disposition of the items or amounts, or any thereof aggregating the excess mentioned in either of paragraphs 5 (c) or 5 (d) of this prayer, said sections and paragraphs, as so construed, violate the Commerce Clause of Article I of the Constitution of the United States and Amendment X thereto; or

(f) That, in the event it should be held that the Commission and its members, and not the Department and its members, have exclusive jurisdiction over the plaintiff's primary, dominant and principal books of accounts and of the entries made and to be made and amounts entered and to be entered therein and adjustments thereof, the action of the Department, as evidenced by its order (Ex. 2 hereto)

with respect to the approval and direction of entries made and to be made in said books of accounts and the Arkansas statute purporting to authorize said action, violate the Commerce Clause of Article I of the Constitution of the United States and the said action of the Department, and the statutes purporting to authorize the same are void and of no force and effect; and

(g) That, in any event, this court declare, order and decree that to require the plaintiff to charge off or amortize out of its primary, dominant and principal books of accounts the amount of $6,947,058.92, determined by the Department to represent both arm's-length cost to plaintiff and the present value of existing assets would deprive the plaintiff of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States and is therefore unwarranted and unauthorized;

(6) That plaintiff have all other and further relief to which, under the pleadings and the evidence it may be entitled.

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* * * * * * * * * *

Answer and Cross-Claim of the Department of Public Utilities of Arkansas and the Commissioners Thereof and Exhibits Thereto.

523 Filed Feb 16 1945

I

The Department of Public Utilities of the State of Arkansas and Charles C. Wine, A. B. Hill and Marvin Hathcoat, the commissioners thereof (hereinafter referred to collectively as the Department) enter their appearance in this cause. The Department voluntarily submits to the jurisdiction of the court in this cause for the reason that the complaint presents to this court for decision issues arising under the constitution and laws of the United States and the constitution and laws of Arkansas which, if decided adversely to the interests of the State of Arkansas, would destroy one of the fundamental powers of the State of Arkansas as will be more specifically set out in the Cross-claim hereinafter stated against the Federal Power Commission and its commissioners. It is to the best interest of the Department, and other state regulatory com-
524 missions, for such issues to be finally adjudicated and this cannot be done in this action unless the Department submits to the jurisdiction of the court.

Answer

II

The Department denies that the action of the Department in determining the original cost of plaintiff's prop-

erty, the excess of the recorded cost thereof over its original cost, and the disposition of the excess as made by the Department in its order (Pl. ex. #2) and the direction that the disposition should be entered in plaintiff's primary, dominant and principal books of accounts is void and of no effect as alleged in Paragraph 41 of the complaint.

The Department denies that it should be permanently enjoined from prosecuting the plaintiff under the laws of Arkansas for any failure on the part of the plaintiff to comply with Act 324 of the General Assembly of Arkansas, approved April 2, 1935, and the orders, rules and regulations of the Department as alleged in Paragraph 43 of the complaint.

The Department, therefore, prays that the complaint be dismissed as to any and all relief for which the plaintiff prays against this defendant and for such further general relief to which this defendant may be entitled.

Cross-Claim

III

For its cross-claim against the Federal Power Commission and Basil Manly, Leland Olds, Claude L. Draper, Nelson Lee Smith and John W. Scott, as commissioners thereof, (hereinafter referred to collectively as the Commission) the Department states:

525 IV

The Department was created by Act 324 of the General Assembly of the State of Arkansas, approved April 2, 1935. By the terms of the act, the Department is vested with power and jurisdiction, and it is charged with the duty, to supervise and regulate every public utility defined in the act and to do all things necessary or expedient in the exercise of its power or jurisdiction. The Department is empowered to make reasonable rules pertaining to the operation, accounting, service and rates of public utilities, and to ascertain and fix the value of the property of any public

utility insofar as the same is material to the exercise of the jurisdiction of the Department. The Department is empowered to establish uniform systems of accounts to be kept by any public utility subject to its jurisdiction and to prescribe the manner in which such accounts shall be kept. The Department was given broad and comprehensive powers and was established by the legislature to act for it, and it has the same power the legislature would have to regulate public utility companies operating in Arkansas.

V

Plaintiff is an Arkansas Corporation. With a very minor exception, all of its property is located in Arkansas. All of plaintiff's business is transacted in Arkansas and plaintiff is a public utility subject to the jurisdiction of the Department under the terms of Act 324 of 1935. Plaintiff has been subject to the jurisdiction of the Department since April 2, 1935, the date of the approval of Act 324. By its order of July 2, 1937, the Department actually took and has since retained jurisdiction of the plaintiff. The purpose of the order of July 2, 1937, was to determine the reasonableness and lawfulness of all rates, rules, practices,
526 regulations and contracts applicable to plaintiff's electric service in Arkansas and if any thereof was found to be unreasonable, unjust or otherwise unlawful to determine and fix reasonable, lawful, and just rates, rules, regulations and contracts to be charged, collected and observed. A copy of the order is made a part hereof and designated as Department's Exhibit 1. The Department has continued its investigation and supervision of plaintiff since the issuance of its order of July 2, 1937.

VI

On November 10, 1943, the Department issued its order directing that a hearing be held to establish the fair and reasonable rate base and rate of return thereon with respect to plaintiff's electric property used and useful in

the public service and to fix reasonable rates to be charged thereafter by plaintiff. Plaintiff was directed to show cause why the original cost of its electric property, less accrued depreciation, should not be established as the electric rate base and why plaintiff's books and accounts should not be adjusted to conform to the Department's uniform system of accounts. Plaintiff was further ordered to show cause why it should not be required to write out of its accounts amounts which did not reflect actual value. A copy of the Department's order of November 10, 1943, is filed herewith as Department's Exhibit 2.

VII

Plaintiff filed its response to Department's order of November 10, 1943, and thereafter extensive hearings were held before the Department relating to all the issues raised by the Department's order. As a result of such hearings, the Department entered its order of June 24, 1944, (Pl. ex. #2). In its order of June 24, 1944, the Department found, among other things, that the books, records and accounts prescribed by the Department shall be the official corporate accounts and records of the plaintiff. The order of
527 the Department was affirmed by a judgment of the Circuit Court of Pulaski County, Arkansas, the court having jurisdiction under the laws of Arkansas to review such order (Pl. ex. #3).

VIII

Pursuant to the order of the Commission dated May 11, 1937, and pursuant to Electric Plant Instruction 2-D of the Commission's uniform system of accounts, the Company filed with the Commission in May 1940 a report of its studies relative to the reclassification of its Electric Plant accounts as of December 31, 1936. Thereafter the staff of the Commission made an investigation of the Company's report. The Department, at the request of the Commission, assigned members of its staff to participate in the investi-

gation made by the staff of the Commission. This investigation was completed in June 1942. The then chief accountant of the Department was requested by the Commission to join in the report filed by its staff; but he declined to do so for the reason that, although he was in agreement with the report as a whole, he could neither approve nor disapprove the individual items of adjustment or their inclusion in the particular account to which they had been assigned in the report of the Commission's staff.

IX

On June 15, 1943, the Commission, under its Docket IT-5829, ordered the plaintiff to show cause why the Commission should not direct the plaintiff to make certain adjusting entries in its records and accounts. On September 18, 1943, plaintiff filed its response to the Commission's order of June 15, 1943.

X

The hearing before the Commission pursuant to its order was postponed by the Commission several times
528 pending the outcome of the hearing which was then being conducted by the Department. In the meantime, the staff of the Commission had been engaged in making further studies of the Company's report. On September 27, 1944, the Commission issued its "Supplemental Order to Show Cause" in its Docket IT-5829 in which the Company was directed to file a response "to the recommendations contained in the supplemental report of the Commission's staff." The hearing pursuant to this order has been set for February 20, 1945.

XI

By its orders and proceedings under its Docket IT-5829, the Commission is asserting power to regulate and control the official corporate records of the plaintiff and to require plaintiff to write out of its accounts and records amounts which the Department has found, after extensive investiga-

tion and hearings, to represent actual value. The Commission is asserting its power under the provisions of section 3, paragraph 13, section 4 (b), section 301 (a), section 304 (a) and section 309 of the Federal Power Act.

XII

The jurisdiction of the Commission under the provisions of the Federal Power Act is limited to those matters which have a direct relation to and bearing upon the transmission and sale of electric energy in interstate commerce. The original cost of plaintiff's electric plant as determined by the supplemental report of the Commission's staff is only $254,160.33 less than such original cost as established by the Department's order of June 24, 1944, and such difference could have no appreciable effect upon the establishment of wholesale rates in interstate commerce over
529 which the Commission has jurisdiction. The establishment and disposition of amounts in Account 107 and Account 108.15 as determined by the Commission's staff have no relation to or bearing upon the power of the Commission to regulate the transmission and sale of electric energy at wholesale in interstate commerce. The classification of the Company's accounts and the adjustments made by the Company pursuant to the Department's order of June 24, 1944, as now reflected by the official corporate records of the Company furnish adequate and complete information and records necessary for the Commission to exercise its limited jurisdiction conferred upon it by the Federal Power Act.

XIII

The business conducted by the Company is so intimately related to the local welfare of the people of Arkansas that the public interest demands that conflict be avoided and that federal power should not be exercised unnecessarily or harshly and that the demands of comity and courtesy be deferred to. In its effort to vacate and nullify the Department's order of June 24, 1944, the Commission is acting ar-

bitrarily and unreasonably and such act by the Commission is neither necessary nor appropriate in the proper administration of the Commission's jurisdiction under the Federal Power Act.

XIV

The supervision and regulation of the official corporate books and records of the plaintiff is essential to the sovereign duty of the State of Arkansas, acting through the Department, to advance the safety, happiness, prosperity and general welfare of the people of Arkansas; and the power of the State of Arkansas in this respect is complete and exclusive. The asserted jurisdiction of the Commission over the official corporate books, accounts and records of
530 the plaintiff constitutes an unwarranted and illegal attempt by the Commission to dictate to the State of Arkansas what its internal policy shall be with respect to public utilities operating exclusively in the State of Arkansas.

XV

The accounting entries recorded in plaintiff's official corporate records and accounts pursuant to the Department's order of June 24, 1944, were made under the power and jurisdiction of the State of Arkansas reserved to the State under Amendment No. 10 to the Constitution of the United States, and Congress is without power to confer on the Commission any authority or jurisdiction whatsoever over the official corporate records of the plaintiff.

XVI

To the extent that the Federal Power Act undertakes to confer upon the Commission any authority or jurisdiction over the official corporate accounts and records of the plaintiff, such act is unconstitutional and void for the reason that such grant of power by Congress is beyond the limited power conferred upon it by the Constitution and such grant of power, and the exercise thereof by Congress, would trespass upon the rights of the people of Arkansas in violation

of the express terms of Amendment No. 10 to the Constitution of the United States.

XVII

The proceeding before the Commission in its Docket IT-5829 is, in effect, an attempt by the Commission to vacate and set aside the deliberate judgment of the State of Arkansas as to what will best serve the general welfare of its people in the administration of its regulatory power, and is an unwarranted denial of the full faith and credit to
531 which the laws of Arkansas and the judgment of its courts are entitled under section 1 of Article IV of the Constitution of the United States. The proceedings of the Commission constitute a primary step on the part of Congress, acting through the Commission, to assume unlimited power to supervise, control and regulate the intrastate, as well as the interstate, business of public utilities operating exclusively in the State of Arkansas and thus to undermine, subvert and ultimately destroy one of the fundamental and most sacred principles of state government; and the power asserted by the Commission in so doing contravenes the provisions of Article IV, section 1 of the Constitution of the United States.

XVIII

By the terms of Act 324 of the Acts of 1935, the Department has exclusive power to supervise, regulate, restrict, and control the issuance of stock, stock certificates, bonds, notes, and other evidences of indebtedness by the Company and other public utilities incorporated under the laws of Arkansas. Pursuant to such authority, the Department has approved the issuance of securities by the Company based upon values which the Department has found to exist in the Company's capital structure. The Commission proposes by its order to require the Company to write out of its accounts certain amounts which this Department has found to represent value and such finding by the Department forms the basis for the Department's order approving

the issuance of securities by the Company. The action of the Commission in causing the Company to write out of its accounts amounts found by the Department to represent value will be in violation of the order of the Department approving the issuance of such securities and in violation of the Department's exclusive jurisdiction over the issuance of such securities.

532 XIX

The Department is informed and believes, and, therefore, alleges, that the proceedings before the Commission under its Docket IT-5829 will last for a period of from three to six weeks and will be conducted in Washington D. C. In the performance of its statutory duties, at least one member of the Department and several members of the Department's staff will be required to attend and participate in such hearing. All of which will cause the Department to incur considerable expense and will adversely affect the ability of the Department to perform its other statutory duties during the period of such hearing. No corresponding benefit will result in exchange for this expenditure of funds and the temporary inability of the Department to properly discharge its statutory duties.

XX

In the Department's order of June 24, 1944, (Pl. ex. #2) the Department established the rate base applicable to the electric property of the plaintiff as of January 1, 1944, and also established the fair annual return allowable on the rate base so established. The order further provides the method by which the rate base can be determined at future dates by certain calculations based upon the official corporate accounts of the plaintiff as determined by the Department in its order. The order further provides that for a period of up to two years following the cessation of hostilities involving this country plaintiff shall accumulate all amounts representing the excess of its net electric operating revenue over its base allowable return in a fund designated as "Ex-

cess Net Electric Revenue Deferred Credit Fund." At the expiration of the specified period the amount credited
533 to such fund will be prorated between the plaintiff and its electric customers in the ratio set forth in the order.

XXI

The Department is advised and believes, and therefore alleges, that plaintiff will be required to expend not less than $100,000.00 if it is required to defend the proceedings now pending before the Commission under its Docket IT-5829. If the plaintiff is relieved of the necessity of incurring such expense, the amount which it would be required to expend will be credited by plaintiff to the "Excess Net Electric Revenue Deferred Credit Fund" and a major portion thereof will ultimately be refunded to plaintiff's electric customers as provided in the Department's order. The Department alleges, therefore, that the asserted power of the Commission is a direct invasion of the rights of plaintiff's electric customers and it is the statutory duty of the Department to prevent the invasion of such rights by the Commission.

XXII

Wherefore, the Department prays that (a) temporary restraining order be issued restraining the Commission and the members thereof from taking any further action in the case pending on the Docket of the Commission entitled "In the Matter of Arkansas Power & Light Company, Docket IT-5829;" which will be in conflict with the power and jurisdiction of the Department over the official corporate books and accounts of the plaintiff or with the orders heretofore rendered by the Department with respect to such official corporate books and accounts; (b) an interlocutory injunction be entered pending final hearing in this cause; (c) upon final hearing the restraining order be made permanent; (d) that a declaratory judgment be entered by the court to the effect that the exclusive jurisdiction to regulate, supervise
534 and control the official corporate records and accounts

of the Company is vested in the State of Arkansas and the Department to the exclusion of the Commission; and (e) for such further relief against the Commission and the members thereof as the Department may be entitled in the premises.

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Exhibit No. 1 to Answer and Cross-Claim.

535 Filed Feb 16 1945

State of Arkansas

Department of Public Utilities

At a session of the Department of Public Utilities, held in Little Rock, Arkansas, on the 2nd day of July, 1937.

Present: Thomas Fitzhugh, Chairman
H. W. Blalock
Max A. Mehlburger,
Commissioners

Docket No. 225

In the Matter of the General Investigation on Motion of the Department of Electric Operations of Arkansas Power & Light Company.

Order

One of the duties incumbent upon this Department is to establish rate bases for the various companies operating under its jurisdiction. Where a company operates several separate utilities it is necessary to fix rate bases for each utility operation. The rate base, when fixed by the Department, is the amount upon which the company is allowed a rate of return. The rate base is determined after a detailed study of a company's properties and operations. Every claim of value by the company is examined by the Department's technical staff of engineers and accountants to determine the actual value. Actual physical inventory of every piece of property used and useful to the utility consumers is made in determining a rate base.

The Arkansas Power & Light Company has never had a rate base of any of its utility operations established for it by this Department. It being the largest utility company in extent of operations, supplying electric service in fifty-five counties, 154 communities, and to 65,283 electric customers in the state, the Department feels that a great benefit would result both to the utility consumers and the company itself if it immediately proceeds with the necessary invesigations to establish a rate base for its electric utility operations.

Proper and adequate regulation can be accomplished only when the company's accounts are kept in such a manner that the properties of a utility company can be allocated to the various utility operations. Furthermore, the accounts should separate properties and costs of production, transmission and distribution of the utility service. Where production and transmission costs can be determined, separate adjustments can be made in individual communities without a system-wide rate investigation.

The Arkansas Power & Light Company has not furnished the Department with accounts in sufficient detail for adequate regulation. For instance, out of a fixed property account of $65,566,815, there is $43,208,942 which is either unclassified or not allocated to any particular utility service

That is, the Department has no way of knowing at present in which phase of the utility service this unclassified property is used and useful. Consequently, neither the Department nor the Company can determine costs of electric service until the properties used in electric service are separated from the other utility property of the company.

Furthermore, the Department cannot know the cost of delivering electric energy to any city gate until the electric property accounts are broken down to show separately production and transmission costs.

Companies are entitled to rates sufficiently high to earn a fair rate of return on the fair value of the property used and useful in rendering the service. The Department cannot determine the fairness of the present rates of this Company until it knows the fair value of the property, its revenues, operating expenses, and other pertinent facts.

536 The Department does not know that the fixed capital account set up on the company's books is correct. The Federal Trade Commission reported in 1932 a write-up of $6,957,913 over the book accounts of the properties acquired by the Arkansas Power & Light Company prior to consolidation in 1926. The Department believes a thorough investigation of all the company accounts should be made to determine present value of properties for rate-making purposes.

The Company's gross income has increased from $6,989,-021 in 1933 to $8,061,946 in 1936. The gross income for the present year will be probably the largest in the history of the Company. The Company is adding to the present capacity in Little Rock and has recently completed a contract with the Tennessee Valley Authority for additional power in order to be able to comply with increasing demands for power. Electric utility unit costs decrease with fuller utilization of properties. The Department believes that electric rates should be lowered as costs decline. Therefore, an investigation should be made to determine the feasibility of a rate reduction.

The state is looking forward at present toward a period of rapid industrial and commercial development. Electric rates will play an important part in the development of commerce and industry in Arkansas. Our neighbor southern states are enjoying low electric rates due to the influence of Tennessee Valley Authority. If Arkansas is to keep abreast of the development taking place in other southern states, electric rates in Arkansas must be kept as low as consistent with costs.

Furthermore, the Department believes that any benefits arising out of contracts made by a private company operating in Arkansas with Tennessee Valley Authority should accrue to all the consumers in Arkansas.

It Is Therefore Ordered:

1. That on motion of the Department a system-wide investigation of the electric utility operations of the Arkansas Power & Light Company be started immediately.

2. That Dockets numbers 4, 4A and 101 are hereby consolidated in this cause.

3. That the Engineering and Accounting Divisions proceed at once in their investigations of this Company.

By Order of the Department.

(Signed) J. T. Horner, Jr.
Secretary.

Exhibit No. 2 to Answer and Cross-Claim.

537 Filed Feb 16 1945

State of Arkansas

Department of Public Utilities

At a session of the Department of Public Utilities held in its offices, State Capitol, Little Rock, Arkansas, on November 10, 1943.

Present: A. B. Hill, Chairman
Marvin Hathcoat,
Joseph Morrison,
Commissioners

Docket No. 225

IN THE MATTER OF THE GENERAL INVESTIGATION ON MOTION OF THE DEPARTMENT OF ELECTRIC OPERATIONS OF ARKANSAS POWER & LIGHT COMPANY.

Order

The Department, on its own motion, on July 2, 1937, entered an order in this Docket directing a system-wide investigation of the electric utility operations of the Arkansas Power & Light Company (hereafter referred to as Respondent) to be made by its various technical divisions. The Department, by subsequent orders, directed Respondent to file a detailed inventory, appraisal and audit of its electric operations. These have been filed with the Department. It is the settled policy of the Department to secure the lowest rates that are consistent with a fair return on the fair value of the electric property of Respondent used and useful in public service.

Since the issuance of its order on July 2, 1937, the Respondent, in pursuance to subsequent departmental orders, has made a number of substantial reductions in its electric rates. The last of such orders was issued November 7, 1942, and resulted in a customer refund of $625,000.

For the period of the war emergency, the Department adopted a policy of customer refunds to take care of excess earnings in order to eliminate rate base investigations which are always costly, both in manpower and money. Such investigations are slow in reaching the desired result which is the lowest rates to consumers consistent with the fair return upon the fair value of properties used and useful in public service.

On October 7, 1943, the Department requested information from the Respondent to permit it to determine the amount of refund to be made to Respondent's customers out of 1943 revenues. To this request the Respondent, through its President, advised the Department by letter "* * * This matter of refund is an idea and suggestion with which our Company cannot go along * * *". The Department, therefore, deems it advisable to proceed immediately to the final determination of the fair value of the Respondent's electric properties used and useful in public service, of the revenues of the Respondent and their relation to said fair value and of the expenses incurred in Respondent's operations.

It appears that the Respondent, in pursuance of an order of the Federal Power Commission directed to it, has made certain studies relating to the original cost of its electric properties and to the reclassification of such original cost under the system of accounts of the Federal Power Commission and has filed same with the Federal Power Commission. It appears that the reclassification studies and statements filed by Respondent with the said Federal Power Commission would be of material assistance to its investigation of Respondent's properties and operations, although the uniform system of accounts previously adopted by this Department differs in some details from the uniform system of accounts adopted by the Federal Power Commission.

It Is Therefore Ordered:

That a hearing be held in the offices of the Department of Public Utilities in the State Capitol, Little Rock, Ar-
538 kansas, beginning on the 7th day of December, 1943, at 10:00 A. M., before the Department for the purpose

of determining and establishing a fair and reasonable rate base and the rate of return thereon, conforming thereto with respect to Respondent's electric properties used and useful for public service within the State of Arkansas, and to find and affix reasonable rates to be thereafter received, demanded, or enforced by the Respondent; and in the event such reasonable rates be less than these now received by Respondent, that it be ordered that the same be effective from and after January 1, 1943, and the excess, if any, over the rates currently charged, be refunded by the Respondent to its rate payers.

The Respondent is directed to show cause, if any it may have, why the Department should not establish the original costs of Respondent's electric properties, less accrued depreciation, as the rate base of Respondent's electric properties used and useful in its electric operations devoted to public service and to affix the fair return received therefrom.

Respondent ie ordered to show cause at such hearing why it should not be required by the Department to adjust its accounts to conform to the uniform system of accounts adopted heretofore by the Department and to write out or charge off any item or items carried in its books of account which do not reflect actual values.

The Respondent is ordered and directed to make full and complete disclosures at such hearing of all the matters pertinent to the inquiry including, but not limited to:

(a) All studies relating to the original cost of its electric properties and to the reclassification of such costs under the system of accounts of the Federal Power Commission which it has heretofore filed with said Commission, together with copies of all correspondence that has passed between the Respondent and the Federal Power Commission.

(b) All elements of value of the properties used and useful in electric operations devoted to public service in Arkansas.

(c) Respondent's operating expenses with respect to its said properties.

(d) Revenues and their relation to the value of the properties used and useful in public service.

(e) Whether or not there be any items on Respondent's books of accounts which do not reflect actual values.

(f) Fair and reasonable return with respect to such properties.

(g) Reasonable rates to be received, demanded or enforced by Respondent in respect to such properties.

By Order of the Department, this 10th day of November, 1943.

(Signed) ZELLA PASSE
Secretary

* * * * * * * * * *

Motion to Dismiss the Complaint and the Cross-Claim

539 Filed Mar 20 1945

The defendants, the Federal Power Commission, and Basil Manly, Leland Olds, Claude L. Draper, Nelson Lee Smith and John W. Scott, as Commissioners of said Commission, and each of said defendants, respectfully move the Court to dismiss the complaint and the cross-claim herein for the following reasons:

(I) This Court does not have jurisdiction over the subject matter, in that:

(A) The provision of the Federal Power Act for review of the Commission's orders in United States Circuit Courts of Appeals is exclusive and this Court has no jurisdiction.

(B) Such action as the Commission has taken is procedural and interlocutory, and not subject to judicial review.

(C) The plaintiff and the cross-claimants have not exhausted their administrative remedies and accordingly are not entitled to judicial relief.

540 (II) No claim is stated upon which relief can be granted, since the Commission's accounting authority with respect to "public utilities" including plaintiff, is not affected by any accounting requirements prescribed under State law.

(A) The provisions of the Act are dispositive of the question here sought to be raised.

(B) The question sought to be raised has been settled by the uniform decisions of the courts, including that of the Supreme Court in *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U. S. 119.

Wherefore the defendants above named pray that the complaint and cross-claim herein be dismissed, and that oral argument be had on this motion.

Respectfully submitted,

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HOWARD E. WAHRENBROCK,
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Attorneys for defendants, Federal Power Commission and Basil Manly, Leland Olds, Claude L. Draper, Nelson Lee Smith and John W. Scott, as Commissioners of the Federal Power Commission.

* * * * * * * * * *

Memorandum Opinion

541 Filed Jun 6 1945

This is an action against the Federal Power Commission (Commission) and its Commissioners, and the Department of Public Utilities of the State of Arkansas (Department) and its Commissioners.

The complaint seeks (1) an injunction to restrain the Federal Power Commission from taking further action in a proceeding, now on its docket, entitled "In the Matter of the Arkansas Power & Light Company," plaintiff herein, and (2) a declaratory judgment that the exclusive jurisdiction over plaintiff's primary books of accounts and of the entries made and to be made therein is vested in the Department of Public Utilities of the State of Arkansas, defendant herein, and other related declaratory relief. Plaintiff admits that it is a public utility, subject to the jurisdiction of the Commission. The Department and its Commissioners have answered and filed a cross-claim seeking relief similar to that sought by plaintiff They have not intervened, nor sought to intervene, in the proceeding above referred to, now on the docket of the Commission. The Federal Power Commission and its Commissioners have moved to dismiss the complaint and the cross-claim.

542 Sec. 313(b) of the Federal Power Act, 16 U. S. C. A. 825 *l*, provides that any party to a proceeding under this Act, aggrieved by an order issued by the Commission in such proceeding, may obtain a review of such order in an appropriate Circuit Court of Appeals, by filing in such court a written petition praying that the order of the Commission be modified or set aside. This method of judicial review is exclusive. *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 159; *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 124 F. 2d 800, 804 (C. C. A. 3d) cert. denied, 316 U. S. 663; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 48-50; *Miles Laboratories* v. *Federal Trade Commission*, 78 U. S. App. D. C. 326, 328, cert. denied, 322 U. S. 752; *Black River Valley Broadcasts, Inc.* v. *McNinch et al.*, 69 App. D. C. 311, 314, cert. denied, 307 U. S. 623. The Federal Declaratory Judgment Act, 28 U. S. C. A. 400, does not confer upon the court jurisdiction which it does not otherwise possess. *Miles Laboratories* v. *Federal Trade Commission*, supra; *Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. 2d 97, 100 (C. C. A. 5) cert. denied, 299 U. S. 559 This court therefore

does not have jurisdiction over the subject-matter of the complaint.

The cross-claim is governed by the same principles. The Department and its Commissioners cannot escape them by failing to seek relief in the proceeding now pending on the Commission's docket, about which they complain. This they may do by filing a petition for intervention.

If they are allowed to intervene and are aggrieved by an order thereafter issued by the Commission, they may obtain a review of such order as set forth in Sec. 313(b) of the Federal Power Act, supra. If they petition to intervene and their petition is denied, they may obtain a review of such order denying their petition under Sec. 313(b) supra. Moreover, it should be pointed out that the administrative remedies under the Federal Power Act have not been exhausted, and "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over
543 the subject-matter." *Myers* v. *Bethlehem Shipbuilding Corp.*, supra; *Miles Laboratories* v. *Federal Trade Commission*, supra.

Finally, the substantive question raised by the plaintiffs and cross-claimants appears to have been settled adversely to their contention. *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U. S. 119.

The motion of the Federal Power Commission and its Commissioners to dismiss the complaint and cross-claim therefore will be granted. Counsel for the Commission and its Commissioners will submit, on notice, appropriate order.

DAVID A. PINE,
Justice

June 6, 1945

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544 Filed Jun 14 1945

Order Dismissing Complaint and Cross-Claim

This cause came on to be heard on May 16, 1945, upon the motion of the defendants, Federal Power Commission, and Basil Manly, Leland Olds, Claude L. Draper, Nelson Lee Smith and John W. Scott, as Commissioners of said Commission, to dismiss the complaint and cross-claim herein upon the grounds that this Court does not have jurisdiction over the subject matter and that no claim is stated upon which relief can be granted; and the questions presented having been argued by counsel for the respective parties, as well as the Attorney General of the State of Arkansas appearing as *amicus curiae*, the issues involved were submitted to the Court for consideration and decision; and after due deliberation to the Court on June 6, 1945, delivered and filed its memorandum opinion wherein it was found and directed that the motion of said defendants be granted; wherefore, it is, this 14th day of June, 1945,

Ordered, Adjudged and Decreed that the said motion be and the same is hereby granted, and that the complaint and cross-claim herein be and the same are hereby dismissed as to the defendants, Federal Power Commission, and Basil Manly, Leland Olds, Claude L. Draper, Nelson Lee Smith and John W. Scott, as Commissioners of said Commission, for the reasons set forth in said memorandum opinion.

DAVID A. PINE,
Justice

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Notice of Appeal

546 Filed Sep 13 1945

Notice is hereby given this thirteenth day of September, 1945, that Arkansas Power & Light Company, plaintiff above-named, hereby appeals to the United States Court of Appeals for the District of Columbia from that portion of the final judgment of this Court entered on the fourteenth

day of June, 1945, which dismissed the complaint as to the defendants, Federal Power Commission, and Basil Manly, Leland Olds, Claude L. Draper, Nelson Lee Smith and John W. Scott, as Commissioners of the Federal Power Commission.

VIRGINIA COLLINS DUNCOMBE
701 Union Trust Building
Washington 5, D. C.
Attorney for Plaintiff,
Arkansas Power & Light Company

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547 **Memoranda**

September 13 1945

Copy of notice of appeal mailed by clerk to Shannon & McAllister.

Bond ($250.00) of Plaintiff on appeal approved and filed.

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WEDNESDAY, FEBRUARY 13TH, A. D. 1946

* * * * *

Before Honorable BENNETT CHAMP CLARK, WILBUR K. MILLER, Associate Judges, and JAMES W. MORRIS, Associate Justice, District Court of the United States for the District of Columbia, sitting by designation

* * * * *

No. 9125. January Term, 1946

ARKANSAS POWER & LIGHT COMPANY, APPELLANT

vs.

FEDERAL POWER COMMISSION, ET AL., APPELLEES

On motion of Mr. Spencer Gordon, Messrs. P. A. Lasley of the Bar of the Supreme Court of Arkansas and A. J. G. Priest of the Bars of the Court of Appeals of New York and Supreme Court of Idaho were permitted to argue for appellant pro hac vice by special leave of Court.

On motion of Mr. Howard C. Kilpatrick, Mr. Cleveland Holland of the Bar of the Supreme Court of Arkansas was permitted to argue as amicus curiae pro hac vice by special leave of Court.

Argument commenced by Mr. P. A. Lasley, attorney for appellant, continued by Messrs. Cleveland Holland as amicus curiae and Lambert McAllister, attorney for appellee, and concluded by Mr. A. J. G. Priest, attorney for appellant.

* * * * *

Opinion

United States Court of Appeals, District of Columbia

No. 9125

ARKANSAS POWER & LIGHT COMPANY, APPELLANT

v.

FEDERAL POWER COMMISSION, ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Columbia

* Argued February 13, 1946—Decided June 28, 1946

Messrs. P. A. Lasley, of the Bar of the State of Arkansas, and A. J. G. Priest, of the Bar of the State of New York, pro hac vice, by special leave of Court, with whom Mrs. Virginia C. Duncombe was

on the brief, for appellant. Mr. Spencer Gordon also entered an appearance for appellant.

Mr. Cleveland Holland, Assistant Attorney General of the State of Arkansas, of the Bar of the State of Arkansas, pro hac vice, by special leave of Court, with whom Mr. H. Cecil Kilpatrick was on the brief, for the State of Arkansas as amicus curiae, urging reversal.

Mr. Lambert McAllister, Special Counsel, Federal Power Commission, with whom Mr. Howell Purdue, Senior Attorney, was on the brief, for appellee Federal Power Commission. Messrs. Howard E. Wahrenbrock, Assistant General Counsel, and Louis W. McKernan, Principal Attorney, Federal Power Commission, entered appearances for appellee Federal Power Commission.

Before CLARK and WILBUR K. MILLER, Associate Justices, and JAMES W. MORRIS, District Judge.*

WILBUR K. MILLER, J.: This appeal may be summarized as a request for the answer to a single question: is the Arkansas Power & Light Company entitled, in a suit for a declaratory judgment, to a judicial determination as to whether the Federal Power Commission or the Arkansas Public Service Commission has exclusive regulatory control over its official corporate accounting records?

It should be noted at the outset that we are not now concerned with deciding which commission possesses the exclusive right of control which both claim; consequently we are not presently confronted with the problem of interpreting the federal and state statutes involved, in order to decide which commission has the paramount power. Our task is simply to ascertain whether the complaint exhibited a justiciable controversy properly cognizable under the Declaratory Judgment Act.[1] That is to say, this appeal does not present for review a judgment of the lower court holding that either this or that commission has sole regulatory authority over the company's official corporate accounts; for the District Court did not reach that question. The order from which this appeal is taken went only so far as to dismiss the complaint[2] "upon the grounds that this Court does not have jurisdiction over the subject matter and that no claim is stated upon which relief can be granted."

Difficulty in considering this matter is avoided if it be borne constantly in mind that the case does not have to do with bookkeeping entries or accounting problems as such. The purpose of the suit is merely to find which commission has the sole, exclusive right of regulatory control over the official accounts. As far as the declaratory

*Sitting by designation.

[1] 49 Stat. 1027, Judicial Code § 274 (d), 28 U. S. C. A. 400.

[2] The order also dismissed the cross-claim of the Department of Public Utilities of Arkansas (now Arkansas Public Service Commission) but the cross-claimant did not appeal.

judgment sought is concerned, the complaint does not challenge the correctness of, or justification for, any order of either commission with respect to the manner of recording transactions on the company's books, or the allocation of items among prescribed accounts, or the disposition of amounts recorded in various accounts. It is necessary, therefore, in the consideration of this appeal, sharply to distinguish between a judicial review of the manner in which the regulatory control has been exercised, which this case does not involve; and, on the other hand, a judicial determination as to whether the federal commission or the state commission has the right under the law to exercise paramount regulatory supervision and control over official accounting records, which is the relief invoked here.

This case is not like those in which the courts, including the Supreme Court, have permitted two commissions, each having authority in the premises, to require a utility company to keep different sets of accounts, one to accord with the requirements of one commission, and another to meet the requirements of the other commission.[3] For those cases do not deal with a conflict between jurisdictions over the sole right to prescribe official accounting methods, and go no further than to point out the right of a second commission to demand memorandum accounts to suit its purposes, which may differ from the accounts required by another commission which also has authority in the premises.

Here the company asserts its willingness to keep two differing sets of accounts in obedience to the dictates of the two commissions to which it is subject; but it alleges that this will satisfy neither commission, as both assert the right to require the company to keep its dominant, principal, primary and basic accounts[4] in the manner specified by it. It is charged that each commission claims the authority, exclusive of the other, to require the company to keep, not just a set of memorandum accounts in the manner dictated by it, but official corporate accounts and records such as it prescribes. This would involve no practical difficulty if the requirements of the two commissions were identical; but when, as here, the two regulatory bodies insist on divergent and inconsistent action on the part of the company concerning the same subject matter, it is apparent that somehow the conflicting claims to the same right of control should be reconciled.

The confusion as to the issues which is apparent in the briefs filed with us should be dispelled by the realization that a public utility cannot keep more than one set of actual, official corporate accounts.

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[3] Alabama Power Co. v. Federal Power Comm'n, 75 U. S. App. D. C. 315, 128 F. (2d) 280; Hartford Electric Light Co. v. Federal Power Comm'n, 131 F. (2d) 953; Northwestern Electric Co. v. Federal Power Comm'n, 321 U. S. 119; Pacific Power & Light Co. v. Federal Power Comm'n, 141 F. (2d) 602.

[4] These accounts are referred to throughout this opinion as the official corporate accounts.

Neither can any other corporation, for that matter. There must always be an official recording of figures to represent the actualities of the business, to constitute the genuine record of stewardship, the basis upon which representations are made as to the real results of the utility's operations and its true financial condition in reports to stockholders and to the public, and in financial statements to be submitted to prospective investors or creditors. Merely to state this preposition is to demonstrate its soundness, since any reasonable mind immediately perceives that actual transactions can be truly reflected by only one set of figures. A differing set shows only a hypothetical situation, demonstrating the distinction between what is, and what might have been.

Of course it is readily apparent that a public utility can prepare and submit, whenever necessary or required, pro forma accounts, showing what its status would have been had entries been recorded in its books other than those which actually were made; or what the result would have been had various items been placed under headings other than those under which they were actually placed in the official records; or what the situation would have been had this or that capital asset been eliminated by a charge to surplus or annual amortizing charges against earnings. Such alternative accounts are simply in the nature of memoranda, and can never be said to be the official corporate records.

But when a regulatory commission asserts the right to command that an item which another commission, also claiming jurisdiction, has treated as a valuable asset, be charged to surplus or amortized through charges to earnings, the commission which asserts such right to command unquestionably is saying that accounts kept in response to its orders must be, not mere memoranda, but the official corporate records. Such action goes beyond a claim of authority to make bookkeeping or accounting requirements, and touches actual property rights. In such circumstances, a utility should be able to learn from a declaratory judgment which commission has exclusive jurisdiction.

So it is necessary to examine the record to ascertain whether the nature of the appellant's property and business operations is such as to stamp it as a utility under the Arkansas regulatory act, and under the Federal Power Act as well, and consequently subject to regulation by both state and federal commissions. If so, then we must see if the record discloses each commission to be claiming, to the exclusion of the other, the power to dictate and supervise official books of accounts. For if such conflicting claims are shown to exist, the two applicable statutes should have been reconciled by the District Court in a declaratory judgment.

Arkansas Power & Light Company is a public utility, incorporated under the laws of Arkansas and engaged in the business of

generating, distributing and selling electric energy to consumers, and at wholesale to others who resell the energy. It owns no property and does no business outside of Arkansas with the exception of a small distribution extension into Louisiana. Ninety-eight percent of its electric facilities are used solely for the generation and distribution of energy to consumers. All of its wholesale deliveries are made in Arkansas. Less than two percent of the company's electric facilities are used exclusively in the transmission of electric energy sold at wholesale in interstate commerce for resale.

Because the entire business of the appellant is transacted in Arkansas, and 98 percent of its electric facilities are employed in a purely intrastate service of electric energy to consumers, it is a public utility subject to the jurisdiction of the Arkansas Public Service Commission under the provisions of Act 324 of the General Assembly of 1935. By its order of July 2, 1937, the state commission actually took and has since retained jurisdiction of the appellant's business. The state commission's order of that date was for the purpose of determining whether the rates, rules, practices, regulations and contracts of the appellant concerning electric service in Arkansas were reasonable and lawful. On November 10, 1943, the state commission directed that a hearing be held to establish the fair and reasonable rate base, and rate of return thereon, with respect to the appellant's electric property, and to fix reasonable rates to be charged by the appellant for electric service. The company was directed to show cause why the original cost of its electric property less accrued depreciation should not be established as the electric rate base and why its books and accounts should not be adjusted to conform to the state commission's uniform system of accounts. The order further required the appellant to show cause why it should not be required to write out of its accounts any amounts which did not reflect actual value.

Concerning the matters covered by its order of November 10, 1943, the state commission held extensive hearings. Finally, on June 24, 1944, it entered an exhaustive and carefully considered order. It determined that it had jurisdiction to prescribe the manner in which the company should keep its corporate books, accounts and records, and that the books, records and accounts prescribed by it should be the official corporate accounts and records of the company.[5] The order of the state commission then proceeds to

[5] "This Department was created by Act No. 324 of the Acts of 1935, approved April 2, 1935. It is vested with power and jurisdiction to regulate all public utilities doing business in Arkansas with power to prescribe reasonable, uniform rates and practices. The Act expressly provides that the Department, upon its own motion, shall, upon reasonable notice after a hearing, 'find and fix just, reasonable and sufficient rates to be thereafter observed, and enforced and demanded by any public utility.' The Department is charged with the duty to 'ascertain and fix the value of the whole or any part of the property of any public utility.'

"Respondent is an Arkansas corporation and is engaged exclusively in intrastate business. The Department has jurisdiction to 'establish a uniform system of accounts' to be kept by Respondent and to 'prescribe the manner in which such accounts shall be

prescribe the method by which the company shall keep its accounts, and to establish its rate base on what is known in regulatory circles as the prudent investment standard. The prudent investment theory recognizes as the rate base the price paid as a result of arm's-length bargaining for property having actual value which is devoted to the public use, even though that price exceeds the original cost incurred by him who first dedicated the property to public service. The excess is required to be set up in a separate account but is considered as representing actual value and as being a part of the rate base, upon which the utility is entitled to earn a fair return.

Although the federal commission had before it the state commission's order of June 24, 1944, which had definitely claimed exclusive jurisdiction over the official accounting records and had prescribed a prudent investment rate base, neverthless it entered on September 27, 1944, a "Supplemental Order to Show Cause," the text of which is shown in the margin.[6]

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kept.' The Department, therefore, finds that it has jurisdiction to prescribe the manner in which the Respondent keeps its corporate books, accounts and records, and that the books, records and accounts so prescribed by this Department shall be the official corporate accounts and records of the Company. Its jurisdiction over Respondent and its electric and other operations is complete and comprehensive and the Department is the only regulatory authority having such all-inclusive jurisdiction.

"The Department is given power to supervise, regulate, restrict and control the issuance of stock, bonds, notes and other evidence of indebtedness by all public utilities doing business in Arkansas.

"The Act expressly provides that 'every public utility, and every person or corporation, shall obey and comply with each and every requirement of the Act and of every order, decision, direction, rule or regulation made or prescribed by the Department in all matters herein specified, or any other matter in any way relating to or affecting the business of any public utility.'

"The foregoing powers of the Department were sustained by the Arkansas Supreme Court in Dept. of Public Utilities v. The Ark. La. Gas Co., 200 Ark. 983."

Excerpt from order of Department of Public Utilities of Arkansas, dated June 24, 1944.

[6] "It appearing to the Commission that:

"(a) On June 15, 1943, this Commission issued an order requiring Arkansas Power & Light Company ('Company') to show cause in writing, under oath, if any there be, why the Company should not be required to classify $16,610,196.85 in Account 107, Electric Plant Adjustments; $1,108,440.24, in Account 100.5, Electric Plant Acquisition Adjustments; $45,551,920.00 in Account 100.6, Electric Plant in Process of Reclassification; $2,293,567.58 in various Plant in Process of Reclassification Accounts within Account 108,Other Utility Plant; dispose of $2,402,515.42 in Account 107 in the manner described in paragraph (1) of the order of June 15, 1943; submit plans for the disposition of the remainder of $14,207,681.43 in Account 107 and of the $1,108,440.24 in Account 100.5, and prepare and submit to the Commission revised reclassification and original cost studies respecting the amount established in Account 100.6 and the various Plant in Process of Reclassification Accounts within Account 1008.

"(b) On September 18, 1943, the Company filed its response in which, in effect, it proposed to classify $7,791,086.11 of its electric plant at December 31, 1936, in Account 107 and $10,429,819.21 in Account 100.5 and Plant Acquisition Adjustments Accounts within Account 108.

"(c) Thereafter conferences were held between representatives of the Company, the staff of this Commission, and the staff of the Department of Public Utilities of Arkansas, but said conferences failed to produce complete agreement on the issues.

"(d) On January 13, 1944, the Commission set the issues raised by the order of June 15, 1943, and the Company's response thereto, for public hearing on February 16, 1944.

"(e) The hearing was postponed from time to time, in order not to interfere with a rate proceeding being conducted by the Arkansas Department of Public Utilities involving the rates of the Company, and on May 13, 1944, the Commission entered an order postponing the hearing 'pending further order of the Commission.'

"(f) The staff of the Commission in the meantime has been engaged in making further studies of the Company's response and of other data furnished the Staff by the Company, such other data being in the nature of an amendment to the Company's response which have not been formally filed with the Commission by the Company.

"(g) As a result of the additional studies, the staff of this Commission has submitted a supplemental report on the reclassification and original cost studies of electric

The company conceived this to be an assertion by the Federal Power Commission that it possesses authority under the law to require the company to make in its official records the adjustments recommended by the staff, adjustments which are seen to be drastic departures from the company's then existing accounting situation which had come into being through the compulsion of the order of the Arkansas commission. Alarmed at the prospect of being forced to disobey one of the two commissions and so to violate one of the two statutes whatever course it might take, the company compained to the court below that the two regulatory bodies, each proclaiming its paramount power to regulate, had placed it in a dangerous dilemma from which it could be rescued only by a judical determination concerning the contending claims of the two commissions.

The suit was filed in the District Court of the United States for the District of Columbia against Federal Power Commission and

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plant of the Company, which report is to be served herewith upon the Company and is made a part hereof by reference.

"(h) In the supplemental report the staff recommends that the Company be required to classify $11,881,199.23 in Account 107, Electric Plant Adjustments, and $9,293,057.46 in Account 108.15, Common Utility Plant Acquisition Adjustments, all as more fully set forth at pp. 4 to 16 of the supplemental report.[2]

"(i) The staff also recommends in the supplemental report that the Company be required to dispose of the $11,881,199.23 recommended for classification in Account 107 as follows:

"To Account 140, Unamortized Debt Discount and Expense, and Account 271, Earned Surplus, in appropriate amounts, representing unamortized debt discount and expense incurred in connection with the issuance as of October 1, 1926, of First and Refunding Bonds, 5% Series, due 1956, in the principal amount of $18,000,000	$1,497,546.00
"To Account 150, Capital Stock Discount, representing discount on capital stock	75,814.12
"To Account 151, Capital Stock Expenses, representing expenses associated with the issuance of capital stock	254,442.06
"To Account 146, Other Deferred Debits, and Account 271, Earned Surplus, in appropriate amounts, representing deferred franchise expenses erroneously capitalized as cost of plant	36,960.00
"To Account 250, Reserve for Depreciation of Electric Plant, representing unrecorded retirements	874,964.04
"To Account 271, Earned Surplus, or Account 270, Capital Surplus, if properly created for that purpose, representing write-ups and other erroneous charges in the Company's plant account	9,141,473.01
Total	11,881,199.23

"(j) In its supplemental report the staff recommends that the Company be required to submit a plan for the disposition of the $9,293,057.46, to be classified in Account 108.15.

"The Commission orders that:

"(A) At the public hearing to be held in the above-entitled matter, which hearing has been indefinitely postponed, the issues to be determined shall be those raised by the Commission's order of June 15, 1943, as supplemented by this order, and the Company's response to the order of June 15, 1943.

"(B) The Company shall file a response, under oath, within sixty days after the date of this order, to the recommendations contained in the supplemental report herewith to be served upon the Company, including a plan for disposition of amounts to the adjustment accounts. In such response the Company shall set forth any amounts disposed of since December 31, 1936, which are recommended for classification by the staff in Accounts 107 and 108.15 together with the manner in which such disposition was effected.

"(C) The Secretary serve upon the Company a copy of the supplemental report herein referred to concurrently with the service on the Company of this order."

"[2] Account 108.15, Common Utility Plant Acquisition Adjustments, a subaccount of Account 108, Other Utility Plant, is used for the purpose of identifying plant acquisition adjustments arising through acquisitions of properties of more than one utility department.

the Department of Public Utilities of Arkansas.[7] The complaint alleged that the company, which is a substantial electric utility in Arkansas, is a "public utility" in the meaning of the Arkansas statute regulating public utilities, and that, therefore, the state commission is exercising regulatory control over its accounting records and practices; that the state commission has ordered that the company's accounts shall be kept and treated in the manner prescribed by it, and that the accounts so kept and treated shall be the official corporate accounting records of the company.

It is further alleged in the complaint that, after the state commission had ordered changes in its accounting procedure and had established a new rate base and instituted new rates and the company had complied, the Federal Power Commission asserted that it alone possesses the sole, exclusive, and paramount jurisdiction and authority to regulate the official corporate accounting records and practices of the company. The federal commission's representatives made studies of the company's properties and books and thereafter recommended that the federal commission require dispositions of amounts in various accounts quite at variance with the treatment already given, and currently being given, those accounts pursuant to the mandate of the state commission. While the federal commission had not then conducted formal hearings on its staff's report, the complaint alleged that the company had been ordered to show cause why it should not make the adjustments recommended by the federal commission's employees, which adjustments would be violative of the order already entered by the state commission.

Being placed in such a dilemma, and faced with the prospect of incurring heavy penalties should it disobey one of the commissions, and so inevitably violate either the federal or the state statute, and finding it impossible to submit to the authority of both commissions since their claims were in hopeless conflict, the company turned to the Declaratory Judgment Act, presented its problem to the court, and asked to be told authoritatively which of the two commissions actually has, when the federal and state statutes are considered together, the legal right of regulatory control over its official accounts, a right which is necessarily exclusive.

The Arkansas commission came into court voluntarily, alleging that it has the exclusive duty and power of supervisory control over the company's official accounting procedure. It filed a cross-claim against the federal commission and prayed for a judicial declaration that the exclusive jurisdiction to regulate, supervise, and control the official records and accounts of the company is vested in the

[7] After the suit was filed, the official designation of Department of Public Utilities of Arkansas was changed to "Arkansas Public Service Commission." It will be referred to in this opinion as "state commission."

State of Arkansas and its public service commission, and not in the Federal Power Commission.

Thereupon the Federal Power Commission pleaded that it alone has the power claimed by the Arkansas body but that, because it has not finished the process of exercising that power upon which it has already embarked, the District Court cannot resolve the difficulty by deciding as a matter of law where the exclusive right of control lies. It will thus be seen that the statement of an irreconcilable dispute between the two jurisdictions set forth in the complaint was shown by the affirmative pleadings of the two commissions to be an actuality.

In these circumstances the question was, of course, whether a justiciable controversy appeared concerning which a declaratory judgment might properly be rendered. The District Court apparently regarded the complaint as an attempt to review a definitive order of the Federal Power Commission. The reasoning used by it in reaching the conclusion that it did not have jurisdiction over the subject matter of the complaint and cross-claim, and that therefore the motion to dismiss filed by the Federal Power Commission should be granted, is thus stated in its opinion:

"Sec. 313 (b) of the Federal Power Act, 16 U. S. C. A. 825, l, provides that any party to a proceeding under this Act, aggrieved by an order issued by the Commission in such proceeding, may obtain a review of such order in an appropriate Circuit Court of Appeals, by filing in such court a written petition praying that the order of the Commission be modified or set aside. This method of judicial review is exclusive. (Cases cited.) The Federal Declaratory Judgment Act, 28 U. S. C. A. 400, does not confer upon the court jurisdiction which it does not otherwise possess. (Cases cited.) This court therefore does not have jurisdiction over the subject matter of the complaint."

In support of this holding of the court below, the federal commission in its argument before us points out that the complaint shows it has made no appealable order—in fact, has made no order at all—concerning the appellant's accounts. It says the matters pending before it are merely recommendations of its staff of accountants, which, after hearings are held, it may or may not adopt. Hence it argues that, as its administrative process is as yet incomplete, recourse may not be had to any court by a utility which is dissatisfied with its staff's recommendations. The only remedy of one who considers himself aggrieved by the report of the federal commission's staff, it is said, is to wait until the federal commission has entered a final order, and then to appeal to a circuit court of

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appeals, the only form of review permitted by the Federal Power Act.[8]

This argument is valid of course with reference to orders issued by the federal commission concerning the form of accounts to be kept, concerning accounting practices and procedure, and concerning the disposition of amounts in various numbered accounts, because such orders may be reviewed only in the way the statute permits. It must indeed be admitted to be a valid argument concerning any actual exercise by the federal commission of supervisory control over utility accounting books and records.

But the argument is not valid here, because it misses the actual point involved. It ignores the fact, which has been pointed out earlier in this opinion, that this case does not have to do with bookkeeping entries or accounting problems as such, and that the complaint in this case does not seek a judicial review of the manner in which the Federal Power Commission has exercised regulatory control over the company's accounting records.

It is plain, therefore, that the contention of the federal commission to the effect that only its final orders may be reviewed, and then only by the exclusive method of appeal provided by the statute, overlooks the real nature of the controversy as we view it. For, as said before, this appeal is not concerned with the propriety of an actual order of the federal commission concerning the classification or treatment of accounts; it involves only the purely legal problem of determining, after considering together the applicable state and federal statutes, whether the federal commission or the state commission has the exclusive right to control the official accounting records of the company. It is alleged that both commissions claim to have that exclusive right, so this case involves only the search for the proper lodgement of the power of control, and has nothing to do with the manner in which the right of control has been or may be exercised by either commission.

As we have pointed out heretofore, if the record shows both commissions to be claiming to have the sole power and authority of supervisory and regulatory control over the official accounting records and methods of the company, an actual controversy was presented; and it was the right and duty of the District Court to

[8] Title 16, § 825-l (b) U. S. C. A., is in part as follows:

"(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. * * *"

take cognizance of it for the purpose of construing the statutes of the two sovereignties, and then to say authoritatively which commission, under the harmonized statutes, has the regulatory power which both assert, and which only one can exercise.

It is pertinent, therefore, to ascertain whether the record disclosed such a controversy, that is to say, whether it shows that each commission is contending that its organic statute gives it exclusive authority over the company's accounts. It matters not that one of them has not yet entered a definitive order concerning the accounting records; it is enough if the commission which has not entered such an order contends that it has the right to do so, to the exclusion of the authority claimed by the other.

Examination of the pleadings reveals the fact that the federal commission does assert the right to dictate, prescribe and control the utility's official accounting records. We find the complaint stating that the state commission is authorized and empowered by law to require the appellant to keep official books of accounts according to its uniform system and its rules regulating accounting. It is averred in the complaint that the state commission has asserted and exercised that authority and power, and that the appellant has obeyed its orders in that regard. The complaint further alleges that in ordering the appellant to respond to the recommendations of its staff's report, and to show cause why it should not make the accounting adjustments proposed by the staff, the federal commission is manifesting its intention to order changes in the official accounts which are now in the form required by the state commission, and thus in effect is proposing to reject and overrule the state commission's order.

This would seem to be a very definite pleading of an actual controversy, in that it is charged that both commissions claim the power and authority to be the sole arbiter as to the official corporate books of accounts. But, in its argument, the federal commission characterizes the allegations of the complaint to the effect that it will prescribe, control and regulate the official accounting records as nothing more than the appellant's prophecy concerning its future action. It says these allegations, therefore, do not amount to facts well pleaded and are not admitted by the federal commission's motion to dismiss. There would be force in this argument were it not for the fact that the federal commission's motion to dismiss contains this language:

"No claim is stated upon which relief can be granted, since the Commission's accounting authority with respect to 'public utilities' including plaintiff, is not affected by any accounting requirements prescribed under State law."

We regard the quoted words as an affirmative assertion by the federal commission of a claim to the exclusive right to supervise,

regulate and control the appellant's official accounting records, in spite of the allegations in the complaint that the state law confers, and the state commission claims and has exercised, exclusive authority over such official records. It will be noted that the statement above quoted from the motion to dismiss is made by the federal commission itself, and not by its staff. It constitutes an authoritative, affirmative statement that the federal commission believes it has, and will exercise, plenary and exclusive regulatory power over the company's official records of its accounts and business.

In attempted avoidance of a declaratory judgment, the appellees in effect say it is impossible at this point for it to be known whether they will sustain the original cost recommendations in their staff's report; and so the argument is that no controversy or conflict between the commissions is disclosed by the complaint, but only a difference between the Arkansas commission and the staff of the federal agency. Although the complaint alleges the federal commission will impose its original cost theory on the company, that commission replies that the statement is a mere prediction; but without denying its claim of right to override the orders of the state commission. We regard the allegations in the complaint as something more than prophecy. They are based upon the well-known fact that the Federal Power Commission is recognized as being an exponent of the original cost theory of establishing a rate base. It has been so described by the Supreme Court.[9] The federal commission uniformly has construed its system of accounts to require that the excess of prudent investment over original cost be written off.[10]

Scarcely more than a month before the federal commission filed its motion to dismiss the complaint in this case, and in support of that motion argued that it might or might not sustain the theory of its staff which would require, *inter alia*, the sum of $6,947,058.92, by which prudent investment exceeds original cost to be charged off or amortized, it had written a lengthy opinion,[11] in which it considered the proper accounting treatment to be accorded a large sum which it had ordered The Montana Power Company to classify in Account 100.5. The Commission's opinion said:[12]

"The company contends that the cost of intangibles should remain on its books, unamortized and undiminished, indefinitely in the future. * * *

[9] Northwestern Electric Co. v. Federal Power Comm'n, 321 U. S. 119, 123.
[10] In the Matters of St. Croix Falls Minnesota Improvement Co. and St. Croix Falls Wisconsin Improvement Co., 43 PUR (NS) 1, 11; In the Matter of The California Oregon Power Co., 47 PUR (NS) 193, 195; In the Matter of The Montana Power Co., 57 PUR (NS) 193, 226.
[11] Re The Montana Power Company, Opinion No. 120, Feb. 13, 1945, 57 PUR (NS) 193.
[12] 57 PUR (NS) 226.

"Consistent with our action in similar cases heretofore decided, therefore, we reject respondent's contention that the amounts should be kept in the accounts indefinitely without diminution by amortization or otherwise. Considering all the facts in this case, amortization over a reasonable period of time seems proper. Accordingly we shall order the amount of $5,086,428.48, includible in Account 100.5, to be amortized. * * * This is in accordance with our determination in the Pacific Power and Light Company Case in which we were sustained by the circuit court."

In another decision, the federal commission had before it the question of what disposition should be made of amounts in Account 100.5.[13] It reiterated the statement made in the Pacific Power and Light case and another earlier case that the elimination of the amounts in Account 100.5 is mandatory under its system of accounts. The staff's report in this case reflects the policy consistently adhered to and recently reaffirmed by the Federal Power Commission.

There can be no doubt as to the position of the Federal Power Commission as to whether it claims authority superior to that of the state commission, as charged in the complaint. Not only is that position affirmatively stated in the appellees' motion to dismiss, as we have shown, but it is also unmistakably set forth in the brief filed with us by the federal commission. After quoting § 301 (a) of the Federal Power Act (49 Stat. 854, U. S. C. A. Title 16, § 825a), the appellees state that its language gives them comprehensive authority in the regulation of the accounting of public utilities. The appellees then add this significant statement:

"There is no basis in the Act for the contention that the federal authority in this regard is subordinated to or affected by such state accounting requirements. The Act also furnishes no basis for the attempted distinction between the 'primary, dominant and prin-

[13] In its opinion in Re The California Oregon Power Company, Opinion No. 87, 47 PUR (NS) 193, the Commission said:

"[1] In its revised original cost study COPCO established the amount of $828,684.97 in Account 100.5, Electric Plant Acquisition Adjustments. There is no dispute as to the origin or classification of this amount. It represents the excess of acquisition cost over original cost of operating units or systems purchased. The issue is whether such amount should be properly amortized or permitted to remain indefinitely in Account 100.5.[a]

"This problem was before us very recently in the St. Croix Case[b] and again in Re Pacific Power & Light Co.[c] In the case before us we adhere to the conclusions therein reached that:

" 'Except for fictitious or paper increments, which should be charged off at once (American Teleph. & Teleg. Co. v. United States [1936] 299 U. S. 232, 240, 81 L. ed 142, 16 PUR (NS) 225, 57 S. Ct. 170), provision in advance of retirement should be made. In fact, such provision is mandatory under our, and most, if not all, systems of accounts. In practice, tangible plant assets are generally depreciated, whereas intangible assets are amortized. Accordingly, amounts in Account 100.5 should either be charged off immediately or spread over a reasonable period of time, if proper public utility accounting practices are to prevail.' "

[a] Account 100.5 provides that the amounts recorded therein with respect to each property acquisition 'shall be depreciated, amortized, or otherwise disposed of, as the Commission may approve, or direct.'

[b] (1942) F. P. C. Opinions Nos. 72 and 72-A, 43 PUR (NS) 1, 11.

[c] (1942) F. P. C. Opinion No. 84, 46 PUR (NS) 131."

cipal books of accounting' referred to in the complaint and the accounts to be kept in compliance with the Commission's requirements."

Again we say that we do not have before us at this time the question to which the foregoing argument is addressed, but we reproduce the appellees' language because we regard it as a plain statement by the federal authorities that they claim the right to prescribe and regulate the primary, dominant and principal books of accounts, which are the official records.

In view of the nature of the report and recommendations made to the federal commission by its own representatives, in view of its consistent adherence to the original cost standard, in view of the unmistakable tenor of its order of September 27, 1944, and because of its affirmative pleading, and its argument here, it would be unrealistic to entertain any doubt as to whether the federal commission not only claimed, but fully intended to exercise, sole and exclusive jurisdiction over the official accounting records in a manner in conflict with the order already made by the state commission.

It must be concluded, therefore, that the record disclosed to the District Court an actual controversy, which involved conflicting interpretations of the two statutes, the state commission claiming under the Arkansas regulatory enactment the sole right to supervise and regulate the company's accounts, and the federal commission claiming under the Federal Power Act the same exclusive right.

The Declaratory Judgment Act of 1934, invoked by the appellant, is remedial in nature, and uniformly has been construed liberally. It can be applied only in a situation where an actual controversy exists, because the Constitution restricts the exercise of judicial power to cases and controversies. The word actual is one of emphasis rather than one of definition.[14] A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. In this case, which is clearly an adversary proceeding, a sharp controversy is described by the pleadings. It is justiciable, in that the dispute is not hypothetical or abstract. The controversy in the present case is quite definite and concrete, for it puts in bold relief a specific question, arising under statutes from two different jurisdictions which affect one situation; that is, which commission is entitled exclusively to control the company's accounts.

This controversy touches the legal relations of parties having adverse legal interests, just as the Supreme Court has said the controversy must do if it is to be held justiciable under the Declara-

[14] Aetna Life Insurance Co. v. Haworth, 300 U. S. 227, 240.

tory Judgment Act.[15] This is so because the legal relations of the two commissions, which loudly assert adverse legal interests, are involved; and, more important still, this controversy touches the legal relations of the company with the two commissions. It has been further held that to be justiciable the controversy must be real and substantial, admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical statement of facts. Nothing hypothetical appears here; on the contrary the dispute is real and substantial and admits of specific relief through a decree adjudicating the scope of the power of each commission under the factual situation disclosed. Under these principles governing the application of the Declaratory Judgment Act, in view of the nature of the controversy shown by the record, we have no doubt that the judicial function may be appropriately exercised.[16]

The proposition that the Declaratory Judgment Act does not enlarge the jurisdiction of the District Court, which is urged upon us by the appellees, is not applicable. For the basic power of the court certainly includes an interpretation of statutes such as is involved in the present situation, unless that authority is cut off by the method of review of Federal Power Commission orders afforded by the Power Act. It is our view that the fundamental jurisdiction of the District Court to decide a case such as this, which involves no review of a Commission order, is not affected by the exclusive appellate procedure of the Federal Power Act.

It is peculiarly appropriate to invoke the Declaratory Judgment Act when one is uncertain of his rights and may suffer disastrous consequences if he were forced to await the hostile move of an adversary. It is generally agreed by bench and bar that, in providing a remedy to one thus unfortunately situated because of uncertainty as to the nature of his rights, the enactment of the Declaratory Judgment Act was a progressive move, and that the statute is a useful piece of legislation, leading to an early determination of actual disputes, avoiding expensive multiplication of litigation, and making it unnecessary for him who is uncertain as to his legal status to gamble for stakes in the form of substantial penalties should his guess be wrong.

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[15] Aetna Life Insurance Co. v. Haworth, supra.

[16] "Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. Nashville, C. & St. L. Ry. Co. v. Wallace, supra, p. 263; Tutun v. United States, 270 U. S. 568, 576, 577; Fidelity National Bank v. Swope, 274 U. S. 123, 132; Old Colony Trust Co. v. Commissioner, supra, p. 725. And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required. Nashville, C. & St. L. Ry. Co. v. Wallace, supra, p. 264." Aetna Life Insurance Co. v. Haworth, supra, p. 241.

It seems to us, consequently, that the present case presents an unusually appropriate opportunity for the exercise of the judicial function in the manner contemplated by the Congress when it enacted the Declaratory Judgment statute. If the company were required to await the decision of the Federal Power Commission, which inevitably would be contrary to that of the state commission, and then to decide for itself the important legal question as to which commission under the two statutes involved is its real master, it would be faced with the dangerous possibility of making an erroneous interpretation of the two statutes and, because of it, of suffering pains and penalties which follow a violation of the law, which by that time the company already would have committed.

This conclusion is not in derogation of the exclusive method of review stipulated in the Federal Power Act, as we have already pointed out. As the federal commission has made no final order, there is nothing from which an appeal could be taken by the company under the statutory scheme of appeal.

It is argued that Arkansas, through its public service commission, could intervene in the proceeding before the Federal Power Commission and there exhaust its administrative remedy; and, if dissatisfied with the decision of the Federal Power Commission, appeal to a circuit court of appeals. Such a theory presumes that a sovereign state must appear before a federal administrative body in order to have determined the legal effect of one of its own statutes considered in connection with a related federal statute. This proposes a novel extension of federal administrative power. Even if it be said that the Federal Power Commission has the right to exercise the judicial function of interpreting its own organic act, it could hardly be added that that agency also possesses the exclusive right to interpret a statute of one of the States of the Union, and to decide the relation between that state legislation and its own Act.[17] This would be contrary to the purpose for which the Congress enacted the Federal Power Act, which was to supplement, not supersede, the regulatory power of the states.[18]

We do not regard as a valid argument against the power of the District Court to declare the rights of the parties, the assertion that the company could get, by appealing to a circuit court of appeals,

[17] In Macauley v. Waterman Steamship Corporation, decided by the Supreme Court March 25, 1946, it was held that the Tax Court, an administrative body charged by the Renegotiation Act with determining certain factual questions thereunder, may construe the Act by deciding whether it applies to a given situation. The appellees suggest, therefore, that they have the same right with respect to the Federal Power Act. This argument overlooks the fundamental fact that something more is at stake here than merely to gauge the sweep of the federal statute. For it is one thing for a federal administrative agency to rule as to the coverage of its own act when that act stands alone. It is quite another for the agency to decide whether its organic act overrides the statute of a different sovereignty which already has been applied by the state authorities to the situation which the agency desires to control by applying the federal act. That is a task for the courts. We do not understand the Macauley case as extending to a federal agency the unprecedented power of exercising such a clearly judicial function.

[18] Connecticut Light & Power Co. v. Federal Power Comm'n, 324 U. S. 515.

after the federal commission has passed on the question of its own and the state commission's jurisdiction, the judicial determination of the conflict between regulatory jurisdictions which it seeks in the present suit. Existence of another route to the same goal does not preclude a litigant from invoking the Declaratory Judgment Act.[19] And, as the District Court's exercise of jurisdiction in this case will not impinge upon the provision of the Federal Power Act concerning appeals, since that provision relates only to the review of final, definitive orders of the federal commission,[20] we see no reason to deny to the appellant and the two commissions the speedy, relatively inexpensive answer to a vexing problem which will be afforded by a declaratory judgment in this case.

We have noted the argument of the appellees to the effect that the Federal Power Act confers on the federal commission exclusive jurisdiction over the company's official books of accounts, regardless of the state law. Whether it does or not we are not called upon to say. As the District Court considered itself without jurisdiction over the subject matter and so dimissed the complaint and cross-claim, this appeal has to do only with the propriety of that action, and does not permit us to examine the merits of the case. In this connection we have not failed to observe that, after stating its conclusion that a cause of action on which relief could be granted was not pleaded, the District Court's opinion goes on to say:

"Finally, the substantive question raised by the plaintiffs and cross-claimants appears to have been settled adversely to their contention. Northwestern Electric Co. v. Federal Power Commission, 321 U. S. 119."

That this was not intended to be a decision on the merits we have no doubt, as the Court already had expressly disclaimed the right to make such a determination. Moreover, it is not to be supposed that the trial justice, had he so intended, would have dismissed

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[19] Rule 57, Federal Rules of Civil Procedure; Aetna Casualty and Surety Co. v. Yeatts, et al., 99 F. (2d) 665; Delno v. Market St. Ry. Co., 124 F. (2d) 965; Doehler Metal Furniture Co., Inc. v. Warren, 129 F. (2d) 43, 76 U. S. App. D. C. 60; State Mut. Life Assur. Co. of Worcester, Mass. v. Webster, et al., 148 F. (2d) 315; Moore's Federal Practice Under the New Federal Rules, v. 3, p. 3194; Borchard, Declaratory Judgments, 2d Ed., pp. 342–4, where it is said:

"Thus, a court should not by declaratory judgment ordinarily interfere with the jurisdiction of an administrative commission, especially where the statute is not ambiguous and where the jurisdiction of the commission depends on a jurisdictional fact, such as the weight of a truck, which the commission must in first instance determine. So, when the statute provides that an appeal from an administrative determination may be taken only in a certain way and to a certain court, such as appeal from the National Labor Relations Board to the Circuit Court of Appeals, it would have been wrong for another court, like a United States District Court, to interfere and entertain a suit for a declaration that the National Labor Relations Board had no jurisdiction over a particular case.

"But this is quite different from asserting that whenever there is an administrative method of relief it is necessarily exclusive. That will depend on the presumed intent of the legislature. If the question is one of law or of the jurisdiction of the commission, it may be judicial economy and wisdom to decide the issue by declaration before the administrative channel has been invoked or exhausted."

[20] Federal Power Comm'n v. Metropolitan Edison Co., 304 U. S. 375.

with a casual observation important questions of law which seem not to have been heretofore discussed by any court, with the exception of a brief mention by the Court of Appeals for the Fifth Circuit in Alabama Power Company v. Federal Power Commission.[21]

We think a justiciable issue was disclosed and that it was error to grant the motion to dismiss. The judgment appealed from is therefore reversed and the cause is remanded. The District Court should set aside its order dismissing the complaint, then deny the motion to dismiss and proceed to determine the controversy. While the state commission did not appeal from the order dismissing its cross-claim, probably the District Court on its own motion will set aside that order also.

Reversed.

MORRIS, District Judge sitting by designation, dissenting: I regret that I cannot agree with the majority. The Arkansas Power and Light Company admittedly is a "public utility" within the meaning of the Federal Power Act. It is also admittedly a "licensee" within the meaning of that Act.[1] The Federal Power Commission is given explicit power and jurisdiction to require every licensee and every public utility to make, keep and preserve such accounts as the Commission may by rules and regulations prescribe as necessary or appropriate for the purposes of the administration of the Act, and is specifically authorized to prescribe a system of accounts to be kept by licensees and public utilities.[2] It is expressly provided, however, "that nothing in this chapter shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State."[3]

The Power Company here has been required by the Department of Public Utilities of the State of Arkansas to make and keep certain accounts in accordance with the laws of that State and regulations pursuant thereto. The Federal Power Commission has directed the Power Company to show cause why certain of its accounts should not be made to conform with certain recommendations made by members of the Commission's staff, and fixed a hearing for that purpose. The recommendations are that the assets of the Power Company be shown at an "original cost" figure substantially less than the "prudent investment" or "fair value" figure which is required by the Department of Public Utilities of the State of Arkansas. In this situation, and before any hearing had

[21] 124 F. (2d) 602.

[1] Exhibit 8 to complaint, par. 3, sec. 2. "The respondent [Arkansas Power and Light Company] also owns and operates two hydroelectric projects licensed under the Federal Water Power Act of 1920."

[2] Sec. 301a, Federal Power Act, 16 U. S. C. A. 825 (a).

[3] Id.

been had before the Federal Power Commission, the Power Company filed this suit in the District Court against the Federal Power Commission and its members and the Department of Public Utilities of the State of Arkansas and its members, seeking injunctive relief against the Federal Power Commission and a declaratory judgment to the effect that the Federal Power Commission has no authority under the Federal Power Act to require the Power Company to make and keep the accounts here involved. In the event it be determined that the Federal Power Commission has such authority, then the complaint seeks a declaratory judgment that the action of the Department of Public Utilities of the State of Arkansas is void as being repugnant to the Commerce Clause of the Constitution of the United States. The District Court, upon motion, dismissed the complaint, holding that it was without jurisdiction in the premises. From this action the Power Company appealed. The Department of Public Utilities of the State of Arkansas, which had voluntarily appeared in the court below, did not appeal, but the Attorney General of the State of Arkansas appeared as amicus curiae, supporting the position of the Power Company.[4]

It is, of course, not disputed that statutory provision is made for the judicial review of any final action by the Power Commission.[5] It is insisted, however, that such statutory review is not adequate in the present situation in that the Power Company finds itself in a dilemma brought about by the contentions of the Arkansas Department and the Power Commission that each has exclusive control over the same accounts of the Power Company; that to obey one will result in penalties from the other, and furthermore that the Congress had no intention of giving such exclusive control to the Commission with respect to accounts of a public utility controlled by state authority. This is based upon the proviso in Section 301 (a) of the Federal Power Act, which has been mentioned, that public utilities shall not be relieved from keeping accounts required under authority of the laws of any State read

[4] Subsequent to the order of the District Court dismissing the complaint, the Department of Public Utilities of the State of Arkansas, the name of which has been changed to Arkansas Public Service Commission, and its members, and the State of Arkansas have intervened in the proceedings pending before the Federal Power Commission. Appendix, appellee's brief, pp. 40–41.

[5] Sec. 313, Federal Power Act, 16 U. S. C. A., 825-l (a). Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. * * * No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *

in connection with Section 201 (a) of that Act.[6] Stated somewhat differently, the contention is that the declaration of policy in 201 (a) to the effect that the federal regulation was to extend only to those matters which are not subject to regulation by the States extends to and controls the power given to the Power Commission to control accounts. It seems to me rather late in the day for this to be urged as the basis for a District Court taking jurisdiction in a case where there is admittedly statutory provision for an administrative hearing with judicial review. In the first place, it has been repeatedly held that the language employed in Section 201 (a), just mentioned, was intended as a limitation on the federal authority so that it would extend only to the generation, transmission and sale of electric energy, which was not subject to regulation by the State, and that such language was not intended to be a limitation upon the power of the Commission with respect to the corporate financial arrangements of the utilities engaged in such production and distribution. Such was held to be the law in Jersey Central Co. v. Power Commission, 319 U. S. 61, 74. In that case, the Court was concerned with Section 203 (a).[7]

In the opinion, however, it is stated:

"This conclusion finds strong support in the fact that not only Sec. 203 (a), here under discussion, but Secs. 204 (a), 208 and 301 (a) regulate matters obviously subject to state regulation. If the scope of the limitation was as broad as petitioners contend, none of these sections just referred to would be effective. Section 203 (a) would be a nullity as of course the disposition and acquisition of facilities, merger, consolidation or purchase of securities by their utilities may be regulated by the states. But this does not follow where a specific limitation is placed on the issue of securities by Sec. 204."[8] [Emphasis supplied.]

It has been held that Section 201 (a) does not qualify Section 301 (a) where the latter was directly involved. Northwestern Electric Co. v. Federal Power Commission (C. C. A. 9th), 125 F. (2d) 882, 885. It is of striking significance that, where the Congress intended to limit the powers of the Commission with respect

[6] 16 U. S. C. A. 824 (a). It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in sections 824–825r of this title and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

[7] 16 U. S. C. A. 824b (a). No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. * * *

to corporate financial matters, which were controlled by state authority, it expressly made such limitation. Section 204 (f).[5]

It is insisted, however, that the character of the accounts involved here are such as constitute what the Power Company terms as their "primary, dominant and principal books of account," and which in the Court's opinion are variously denominated "dominant, principal, primary and basic accounts" and as "official corporate accounts." The postulate is that one authority, and only one, can control the keeping of such accounts, and that the exercise by one authority necessarily excludes the exercise of authority by the other. It is further asserted by the Power Company, and accepted in the Court's opinion, that the Power Commission here is seeking to exercise its authority to the exclusion of the right of the Arkansas Department to require accounts involving the same subject matter and to control those so required. In so far as the accounts here involved are concerned, I cannot agree with either of these conclusions. The Federal Power Act nowhere recognizers any category of accounts as "primary, dominant and principal books of account" or "dominant, principal, primary and basic accounts" or "official corporate accounts," nor does the Act expressly exempt such accounts from the authority of the Power Commission. It has been repeatedly determined that accounts of the character here involved of a "public utility" or "licensee" may be required and controlled by the Power Commission, and that notwithstanding accounts covering the same subject matter are required to be kept and controlled by a competent state authority on a different basis. In Northwestern Electric Co., et al. v. Federal Power Commission, 321 U. S. 119, the Supreme Court affirmed Northwestern Electric Co. v. Federal Power Commission, 134 F. (2d) 740, decided by the Circuit Court of Appeals for the Ninth Circuit, in which it was held that the Power Commission had the authority to require and control accounts respecting the valuation of assets on a basis of "original cost" notwithstanding the sanction by a state authority of a different valuation on a "prudent investment" basis. Mr. Justice Roberts, speaking for the Court, stated in the opinion:

"Nothing in the statute or the order prevents Northwestern keeping other accounts if it so desires which will give information with regard to estimated present appreciated value of its assets."

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[5] 16 U. S. C. A. 824c (a). No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. * * *

(f) The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

In Pacific Power and Light Company v. Federal Power Commission (C. C. A. 9th), 141 F. (2d) 602, respecting an order of the Power Commision fixing the valuation of the assets of the public utility there involved on an "original cost" basis, the Court pointed out that the order of the Power Commission does not prohibit the keeping of other accounts on a "present fair value" basis. In Louisville Gas & Electric Co. v. Federal Power Commission, 129 F. (2d) 126, 133, the Circuit Court of Appeals for the Sixth Circuit, dealing with a licensee, stated:

"Section 301 (a) of the 1935 Act provides that every licensee and public utility shall make, keep, and preserve for such periods such accounts, records of cost, accounting procedures, etc., as the Commission may, by rules and regulations, prescribe. Furthermore, the provision that nothing in the Act should relieve a public utility from keeping such accounts as are required by the laws of the state, impliedly, if not expressly, discloses a purpose that the Commission shall prescribe such accounting system, notwithstanding that the state has required a like or a different system of accounts."

The authority of the Commission to require and regulate such accounts is recognized in various other jurisdictions.[9] This Court expressly sanctioned the exercise of such authority over the accounts of a "licensee" in Alabama Power Co. v. Federal Power Commission, 75 U. S. App. D. C. 315, 320; 128 F. (2d) 280, 285, wherein it was stated:

"The language of the statute and the clearly stated powers and duties of the Commission leave no doubt that, while a division of authority between it and appropriate state agencies is contemplated, so far as concerns regulation, the Commission is vested with summary and unlimited powers over the accounts of its licensees to the extent necessary to insure proper performance of its duties. If the State, in the proper performance of its duties, wishes to require the keeping of a separate set of books no doubt it can do so. And if the Company wishes to keep a third set for its own purposes there seems to be nothing in the law to prevent it from doing so. But two things are certain: (1) The statute clearly contemplates that the Commission may require the licensee to establish and maintain accounts; (2) the licensee must allow the Commission to have access to all accounts which it does keep."

No case has been cited, nor have I been able to find one, which has held contrary to those supporting the authority and jurisdiction of

[9] Northern States Power Co. v. Federal Power Commission (C. C. A. 7th), 118 F. (2d) 141; Niagara Falls Power Co. v. Federal Power Commission (C. C. A. 2d), 137 F. (2d) 787; Pennsylvania Power & Light Co. v. Federal Power Commission (C. C. A. 3d), 139 F. (2d) 445; California Oregon Power Co. v. Federal Power Commission (C. C. A. 9th), 150 F. 2d) 25.

the Power Commission to require and control accounts of the character here involved. The Power Company leans most heavily on the decision of the Supreme Court in Connecticut Light and Power Co. v. Federal Power Commission, 324 U. S. 515, but in that case the question was whether or not the Connecticut Light and Power Company was a public utility within the meaning of the Federal Power Act, and, therefore, whether or not the Federal Power Commission had any authority or jurisdiction respecting any accounts of the Connecticut Company. It was there decided that this Court proceeded upon an erroneous interpretation of Section 201 [10] in affirming an order of the Power Commission which determined the Connecticut Company to be a public utility. It was, therefore, considered doubtful that the Power Commission had applied the correct law with the result that the judgment of this Court was reversed, and it was directed that the cause be remanded to the Federal Power Commission for determination of the jurisdictional facts in accordance with the law as stated in the Court's opinion. Certainly there is no support for the Power Company's position here to be found in the Connecticut Company case. The significant thing about the action in that case, in so far as it is relevant here, is that the Supreme Court considered it necessary and proper for the jurisdictional facts to be determined by the Federal Power Commission.

I do not share the view expressed by the Court that facts are alleged in the complaint which show that the Power Commission has done, or threatens to do, anything which interferes with the clear right of the Department of Public Utilities of the State of Arkansas to require the Power Company to establish and maintain accounts such as that Department requires, and to control such accounts so established. The conclusion that the Power Commission does so threaten is based upon certain language in the Power Commission's motion to dismiss the complaint:

"No claim is stated upon which relief can be granted, since the Commission's accounting authority with respect to "public utilities," including plaintiff, is not affected by any accounting requirements prescribed under state laws."

The construction I put upon this language is that the Power Commission is asserting what the numerous authorities have said it had the right to do, namely, to require the Power Company to keep such accounts entirely independent of and unaffected by any state requirements. I do not construe such language to be an assertion that the Power Company shall not keep accounts required of it by the state authority and in strict compliance with such state

[10] 16 U. S. C. A. 824.

regulation and control. Such assertion would be in clear violation of the plain language of the Act. Should the Power Commission take any action which would interfere with the authority of the State, or any of its agencies, respecting accounts or any proper regulation of the Power Company, I am confident that upon review in this Court the Power Commission would be stopped in such unlawful action before it became effective.

For the reasons I have stated, I am convinced that there is a full and adequate remedy, with statutory judicial review, which must be followed, and that recourse to the District Court cannot be had in lieu thereof. I can, therefore, see no reason why this case should not be disposed of upon the principle decided in the case of Myers, et al. v. Bethlehem Shipbuilding Corp., 303 U. S. 41. It has been urged that the Myers case could be distinguished from the instant case because of the explicit language in the National Labor Relations Act not found in the Federal Power Act. What lingering doubt that the Myers case had application to administrative agencies other than the National Labor Relations Board has certainly been dispelled by the recent case of Edward Macauley, et al. v. Waterman Steamship Corporation, No. 435, October Term, 1945, decided by the Supreme Court March 25, 1946. In that case there was much stronger basis than here for the contention that the District Court could take jurisdiction, because the contract which were sought to be renegotiated by the Maritime Commission were between the steamship corporation and the British Ministry of War Transport, and not in terms between the steamship corporation and the Maritime Commission. The state of the law is even clearer now that it was when this Court, in Miles Laboratories v. Federal Trade Commission, 78 U. S. App. D. C. 326, 328; 140 F. (2d) 683, 685, speaking through Chief Justice Groner, said:

"On no subject is the opinion of that Court [Supreme Court], as I view it, more definitely fixed than it is on the lack of power of the courts to inject themselves or be injected into proceedings which Congress has committed to the primary jurisdiction of administrative agencies."

In the view here expressed, I do not consider that the District Court had jurisdiction to out or interfere with the jurisdiction of the Federal Power Commission, and, therefore, I am of the opinion that its action in dismissing the complaint should be affirmed.

United States Court of Appeals for the District of Columbia

No. 9125. April Term, 1946

ARKANSAS POWER & LIGHT COMPANY, APPELLANT

v.

FEDERAL POWER COMMISSION, ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Before CLARK and WILBUR K. MILLER, Associate Justices, and JAMES W. MORRIS, District Judge, sitting by designation

United States Court of Appeals for the District of Columbia. Filed June 28, 1946. Joseph W. Stewart, Clerk.

Judgment

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to said District Court for further proceedings in conformity with the opinion of this Court.

Per Mr. JUSTICE WILBUR K. MILLER.

Dated June 28, 1946.

Dissenting opinion by James W. Morris, District Judge, sitting by designation.

In the United States Court of Appeals for the District of Columbia

No. 9125

ARKANSAS POWER & LIGHT COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL., RESPONDENTS

United States Court of Appeals for the District of Columbia. Filed Sept. 3, 1946. Joseph W. Stewart, Clerk.

Designation of record

The Clerk will please prepare and certify a transcript of record on petition for a writ of certiorari to the Supreme Court of the

United States in the above-entitled case, including therein the following:

1. The Joint Appendix to the briefs of the parties in this case;
2. Minute entry of argument;
3. Opinion of this Court;
4. Judgment;
5. This designation;
6. Clerk's certificate.

The Clerk is also requested to send to the Clerk of the United States Supreme Court the original record now on file in his office, which will be returned to him when the case has been disposed of by the Supreme Court.

(S) J. Howard McGrath,
J. Howard McGrath,
Solicitor General of the United States.

Service of copy of the above designation of record in the above-entitled case is hereby acknowledged this 30th day of August 1946.

(S) Charles A. Horsky,
Charles A. Horsky,
Attorney for petitioner Arkansas Power & Light Company.

United States Court of Appeals for the District Columbia

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to —, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and of the proceedings of the said Court of Appeals as designated by counsel in the case of: Arkansas Power & Light Company, Appellant vs. Federal Power Commission et al., Appellees, No. 9125, April Term, 1946, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this ninth day of September A. D. 1946.

Joseph W. Stewart,
Clerk of the United States Court of Appeals for the District of Columbia.
By C. Preston Gainor,
Assistant Clerk.

In the Supreme Court of the United States

October Term, 1946

No. ——

FEDERAL POWER COMMISSION, ET AL., PETITIONERS

v.

ARKANSAS POWER & LIGHT COMPANY, RESPONDENT

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties to the above-captioned case that:

1. For the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining this case on the merits, the printed record shall consist of the following:

a. Joint Appendix to the briefs of the parties in this case.

b. The proceedings had before the United States Court of Appeals for the District of Columbia.

2. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia to file with the Clerk of the Supreme Court the entire transcript of record in the Court of Appeals for the District of Columbia, and any of the parties hereto may refer in their briefs and argument to said transcript of record, including that part which has not been printed.

AUGUST 30, 1946.

J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General of the United States,
Attorney for petitioners Federal Power Commission, et al.

AUGUST 30, 1946.

Charles A. Horsky,
CHARLES A. HORSKY,
Attorney for respondent Arkansas Power & Light Company.

U. S. GOVERNMENT PRINTING OFFICE: 1946

Supreme Court of the United States

No. 543, October Term, 1946

Order allowing certiorari

Filed October 28, 1946

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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U. S. GOVERNMENT PRINTING OFFICE: 1947